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No. 14468

United States
Court of Appeals
for the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND BROTHERS
CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

Transcript of Record

**Appeals from the United States District Court for the
District of Arizona**

FILED

DEC 6 1954

United States
Court of Appeals
for the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND BROTHERS
CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

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vs.

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Appeals from the United States District Court for the
District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Phoenix National Bank Bldg.,
Phoenix, Arizona,

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Attorney for Appellant,
S. J. Carroll.

WILLIAM P. MAHONEY,
JOSEPH C. RAINERI, and
DAN CRACCHIOLO,

Heard Building,
Phoenix, Arizona,

Attorneys for Appellees.

In the United States District Court for the
District of Arizona, Phoenix Division

No. 1875

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND and HIKO SIEBRAND, dba
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

AMENDED COMPLAINT

Plaintiffs complain of defendants and for their
cause of action allege:

I.

Plaintiffs are husband and wife and are residents
and citizens of the State of Iowa. Defendants are
residents and citizens of the State of Arizona.

II.

The matter in controversy exceeds, exclusive of
interest and costs, the sum of \$3,000.00.

III.

On February 20th, 1953, while plaintiffs were
proceeding in their automobile in a northerly direc-
tion on the Tempe Bridge just north of the business
district of Tempe, Arizona, defendants so neglig-
ently, carelessly and wantonly maintained and

operated their motor vehicle and a heavily loaded trailer attached thereto as to cause said trailer to become disconnected and ram into the automobile of plaintiffs with great force and violence.

IV.

As a proximate result of the defendants' aforesaid conduct, plaintiffs were violently thrown about the inside of their automobile [1*] with the following results:

Plaintiff George F. Gossnell received severe, permanent and multiple injuries, including a fracture of the superciliary arch above the left eye; a fracture of two ribs; a compound comminuted fracture of the middle left femur; a linear comminuted fracture of the left knee extending into the joint of the knee; comminuted fracture of the left knee cap; a fracture of the left fibula; and from said injuries plaintiff George F. Gossnell has suffered two spells of embolism in the left lung causing localized pneumonia and has suffered, continues to suffer, and will in the future suffer great pain from said injuries. Plaintiffs further allege that the left leg of plaintiff George F. Gossnell will be rendered stiff and the use thereof permanently impaired.

As a further result of said injuries, plaintiffs have incurred, for the injuries to George F. Gossnell, hospital, doctor and medical expenses in the sum of \$3105.00 to date and will in the future incur expenses for said care in an amount not known to

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

the plaintiffs at this time, all to the plaintiffs' damage in the sum of \$103,105.00.

Plaintiff Estella Gossnell suffered one broken rib and multiple bruises over the entire left side of her body and was hospitalized thereby for a period of one week; said plaintiff was cut on the chin and will be permanently scarred thereby; and, as a further result of said injuries, plaintiffs incurred hospital and medical expenses for said plaintiff Estella Gossnell in the sum of \$205.00, all to plaintiffs' damage in the sum of \$2705.00.

As a further result of the aforesaid negligent conduct of the defendants, plaintiffs' automobile was damaged in the sum of \$1800.00; and plaintiffs have suffered loss of earnings to date in the sum of \$3400.00, and will suffer future loss of said kind in an amount undetermined at this time.

Wherefore, plaintiffs pray for judgment against defendants, and each of them, in the sum of \$111,215.00, for costs herein incurred, and for such other and further relief as the Court deems just.

/s/ DAN CRACCHIOLO,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1953.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant S. J. Carroll, by and through his attorneys, Gibbons and Kinney, and for his answer to the amended complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I and II of said amended complaint.

II.

Answering the allegations contained in Paragraph III, this answering defendant admits that there was a collision by and between a trailer attached to a vehicle which this defendant was driving, and the automobile of the plaintiffs, but in this connection denies that such collision was caused by the negligent, careless or reckless maintenance and operation of said motor vehicle and trailer on the part of this answering defendant.

III.

Answering the allegations contained in Paragraph IV of plaintiffs' amended complaint, this answering defendant alleges that the damages, if any, sustained by the plaintiffs were the direct and proximate result of their sole negligence, of their contributory negligence, or of their sole and contributory negligence, or of an unavoidable accident. [2]

Further answering said Paragraph IV of plaintiffs' amended complaint, this answering defendant

alleges that he is without sufficient information or knowledge to form a belief as to the nature, character and extent of the allegations therein and therefore denies the same.

Wherefore, this answering defendant prays that the plaintiffs take nothing by their amended complaint and that the same be dismissed; and for such other and further relief as may be proper in the premises.

GIBBONS & KINNEY,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant,
S. J. Carroll.

Receipt of copy acknowledged.

[Endorsed]: Filed September 18, 1953.

[Title of District Court and Cause.]

ANSWER OF P. W. SIEBRAND AND HIKO
SIEBRAND, d.b.a. SIEBRAND BROS. CIR-
CUS AND CARNIVAL, TO PLAINTIFFS'
AMENDED COMPLAINT

Come Now the defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, by their attorney, W. Francis Wilson, and in answer to plaintiffs' complaint admit, deny, and allege as follows:

I.

Admit that plaintiffs are husband and wife and

are residents and citizens of the State of Iowa. Admit that the defendants P. W. Siebrand and Hiko Siebrand are residents of Phoenix, Arizona.

II.

Deny each and every, all and singular, allegation contained in Paragraph II, and specifically deny that the matter in controversy between these answering defendants and the plaintiffs exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00) or exceeds the sum of No Dollars or amounts to any sum whatsoever.

III.

Admit that on the 20th day of February, 1953, a trailer came loose from or disconnected from a pickup truck on the Tempe Bridge and ran into the plaintiffs, or the plaintiffs ran into said trailer, and in this connection deny each and every, all and singular, allegation contained in Paragraph III except as herein expressly admitted, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus [3] and Carnival, deny that any trailer of any kind belonging to them was in any wise involved in any accident with the plaintiffs, and deny that the trailer that was involved in the accident was heavily loaded or loaded at all, and in this connection, these answering defendants P. W. Siebrand and Hiko Siebrand allege that the trailer which collided with the plaintiffs or with which the plaintiffs collided, was a tandem-wheeled, aluminum-bodied trailer, which was com-

pletely empty. These answering defendants, P. W. Siebrand and Hiko Siebrand, further deny that at said time and place or elsewhere they or any of their employees or anyone with their consent was operating a truck for them or on their behalf or with their consent in a negligent, careless or reckless manner or in anywise so as to cause any damage of any kind to the plaintiffs, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, allege that there was a truck upon said Tempe Bridge which to the best knowledge of these answering defendants had been pulling an aluminum-bodied, empty trailer, which said trailer was the property of William Siebrand and in no wise the property of these answering defendants, P. W. Siebrand and Hiko Siebrand, or Siebrand Brothers Circus and Carnival, and in nowise was being used or transported at their instance and request or for their benefit or for or with their consent, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, allege that a pickup truck that was their property was upon said Tempe Bridge at said time and place, and had been pulling said trailer and that said truck was at that time driven and operated without the consent of P. W. Siebrand, Hiko Siebrand, or their agent or agents or any agent or agents of Siebrand Brothers Circus and Carnival, nor was said truck at said time and place being operated on any mission or on any joint

venture or in anywise being operated for and on behalf of these answering defendants or Siebrand Brothers Circus and Carnival.

IV.

These answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, deny each and every, all and singular allegation contained in Paragraph IV of plaintiffs' complaint, except as hereinafter expressly admitted, and in this connection these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, admit that as a result of said trailer colliding with the plaintiffs or the plaintiffs colliding with the trailer, the plaintiffs received injuries, the exact nature of which and the exact extent of which the answering defendants do not know, and therefore deny except to admit that the plaintiff, Estella Gosnell, received minor injuries, and the plaintiff, George F. Gosnell, received injuries of a more serious nature, and in this connection, defendants, P. W. Siebrand and Hiko Siebrand, allege that none of said injuries was the direct or proximate result of any action whether negligent, careless or reckless on the part of P. W. Siebrand or Hiko Siebrand or any agent of theirs, nor were said injuries to the plaintiffs the direct or proximate result of a collision with any motor vehicle or trailer belonging to P. W. Siebrand, Hiko Siebrand or Siebrand Brothers Circus and Carnival, nor were said injuries to the plaintiffs caused by the negligence in the operation of any motor vehicle being driven

with the consent of these answering defendants, nor were said injuries the proximate result of any motor vehicle being driven in a careless, negligent or reckless manner by an employee of these answering defendants, nor were said injuries the proximate result of any motor vehicle being driven in a careless, reckless or negligent manner by any agent or person engaged in a joint venture or other venture on behalf of these answering defendants. These answering defendants admit that the automobile of the plaintiffs herein was badly damaged as a result of their colliding with a trailer upon the Tempe Bridge, and deny all responsibility by way of negligence or otherwise for said damage to said automobile.

These answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Circus and Carnival, deny each and every, all and singular, allegation contained in this complaint except as herein expressed and admitted, and having fully answered, pray that plaintiffs take nothing by their complaint against these answering defendants and that they go hence with their costs, and for such other and further relief as to the Court may seem just in the premises.

/s/ W. FRANCIS WILSON,
Attorney for P. W. Siebrand and Hiko Siebrand,
d.b.a. Siebrand Brothers Circus and Carnival.

Affidavit of Mailing attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—TUESDAY, APRIL 13, 1954

This case comes on regularly for trial this date. The plaintiffs are present with their counsel, William P. Mahoney, Esquire, and Joseph Raineri, Esquire. Defendant P. W. Siebrand is present with his counsel, Francis Wilson, Esquire, and defendant S. J. Carroll is present with his counsel, Howard Gibbons, Esquire.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until Thursday, April 15, 1954, at 10:00 o'clock a.m.

Counsel for plaintiffs now states plaintiffs' case to the jury and counsel for respective defendants state defendants' case to the jury.

Plaintiffs' Case

George F. Gossnell is sworn and examined in his own behalf.

And thereupon, at 11:50 o'clock a.m., It Is Ordered that the further trial of this case be continued until two o'clock p.m.

Subsequently, at two o'clock p.m., the jury, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case (Continued)

Estella Gosnell is now sworn and examined on behalf of plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence:

1. Envelope containing receipts.
2. Business card.
3. Appraisers reports on automobile.

P. W. Siebrand is now sworn and cross-examined as an adverse party.

Deposition of Fred Clark is admitted and read in evidence, as Plaintiffs' Exhibit 4.

John Boyd is now sworn and examined on behalf of plaintiffs.

Dr. Ernest E. Pohle is sworn and examined on behalf of plaintiffs.

Plaintiffs' Exhibit 6, X-rays, is now admitted in evidence.

Plaintiffs' Exhibit 7, X-rays, is now admitted in evidence.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued until Wednesday, April 14, 1954, at 11:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
APRIL 14, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Plaintiffs' Case (Continued)

Dr. Stanford F. Hartman is sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit 8, X-rays, is now admitted in evidence.

Donald E. Deuel is now sworn and examined on behalf of plaintiffs.

The following plaintiffs' exhibits are admitted in evidence:

10. Photograph.
11. Photograph.
12. Photograph.
13. Photograph.

Mortality table showing life expectancy of plaintiff George F. Gossnell is admitted and read in evidence.

And thereupon the plaintiffs rest.

At 11:45 o'clock a.m. the jury is admonished by the Court and excused until two o'clock p.m.

Counsel for defendants move for directed verdicts.

It is Ordered that said motions for directed verdict be and they are denied.

At 11:50 o'clock a.m., it is Ordered that the further trial of this case be continued until two o'clock p.m.

Subsequently, at two o'clock p.m., the jury, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendants' Case

Dr. W. A. Bishop, Jr., is sworn and examined for defendants.

S. J. Carroll is now sworn and examined for defendants.

Defendants' Exhibit A, X-rays, is now admitted in evidence.

Defendants' Exhibit D, trailer hitch, is now admitted in evidence.

Owen Kelly is sworn and examined on behalf of the defendants.

Defendants' Exhibit F, invoice, is admitted in evidence.

William Siebrand is now sworn and examined on behalf of defendants.

Defendants' Exhibit G, Title, is admitted in evidence.

The following defendants' witnesses are now sworn and examined:

Joseph Steinberg,

Hiko Siebrand,

Ralph Horsman,

Cora Ritter,

Peter H. Siebrand.

And thereupon, at 4:55 o'clock p.m., It Is Ordered that the further trial of this case be continued until Thursday, April 15, 1954, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
APRIL 15, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendants' Case (Continued)

P. W. Siebrand is called and examined in his own behalf.

And thereupon defendants Siebrand rest.

It Is Ordered that the record show the defendant, S. J. Carroll, adopts testimony of witnesses, William Siebrand, Owen Kelly and S. J. Carroll.

And defendant S. J. Carroll rests.

Both sides rest.

Counsel for defendants S. J. Carroll and Hiko Siebrand move that deposition of Fred Clark be stricken.

It Is Ordered that said motion be denied.

And thereupon at 11:45 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m.

Subsequently, at 1:30 o'clock p.m., the jury, the parties and counsel being present pursuant to recess further proceedings of trial are had as follows:

Whereupon, the case is argued by respective counsel to the jury.

And thereupon, at 4:00 o'clock p.m., It Is Ordered that the further trial of this case be continued until Friday, April 16, 1954, at 9:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
APRIL 16, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

The court duly instructs the jury and the jury retire at 9:55 o'clock a.m. in charge of sworn bailiff to consider their verdicts.

Subsequently, at 12:00 o'clock noon, it is ordered that the marshal provide meals for the jury and their bailiffs during the deliberation of this case at the expense of the United States.

At the hour of 1:50 o'clock p.m., counsel for respective parties being present, the jury return into

open court and are asked if they have agreed upon a verdict. Whereupon the Foreman reports that they have agreed and presents the following verdicts, to wit:

Civ-1875, Phx.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

Against

P. W. SIEBRAND and HIKO SIEBRAND,
d/b/a SIEBRAND BROTHERS CIRCUS
AND CARNIVAL, and S. J. CARROLL,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and assess their damages at \$95,000.00.

A. H. DIXON,
Foreman.

Civ-1875, Phx.

GEORGE GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

Against

P. W. SIEBRAND and HIKO SIEBRAND, d/b/a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn in the
above-entitled action, upon our oaths, do find for
the plaintiffs against defendant S. J. Carroll, and
assess their damages at \$100.00.

A. H. DIXON,
Foreman.

The verdicts are read as recorded and no poll
being desired by either side, the jury is discharged
from the further consideration of this case and ex-
cused until further order.

On motion of counsel for plaintiff,

It Is Ordered that judgment on the verdicts be
entered by the Clerk.

On motion of Francis Wilson, Esquire, counsel
for defendants Siebrand,

It Is Ordered that the execution of judgment be
stayed for a period of thirty days.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and assess their damages at \$95,000.00.

/s/ A. H. DIXON,
Foreman.

[Endorsed]: Filed April 16, 1954. [5]

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendant S. J. Carroll, and assess their damages at \$100.00.

/s/ A. H. DIXON,
Foreman.

[Endorsed]: Filed April 16, 1954. [6]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY
PLAINTIFFS

The plaintiffs above named respectfully request the Court to give to the jury the instructions hereto annexed.

WILLIAM P. MAHONEY, JR.,
J. C. RAINERI,
Attorneys for Plaintiffs. [7]

Plaintiffs' Requested Instruction No. 1

The Arizona Code, 1952 Cum. Supp., Sec. 66-183, provides as follows:

“No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.”

Given.

DAVE W. LING,
Judge.

[Pencilled in margin]: Give No. 7.

Plaintiffs' Requested Instruction No. 2

You are instructed that if you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended and did join their efforts in furtherance of the Circus and Carnival Show to be shown at the Maricopa County Fair at Mesa for their joint profit then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant S. J. Carroll. I further instruct you that, if you find from a preponderance of the evidence in this case, that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same then they may recover from the defendants and your verdict would be for the plaintiffs.

Hoge v. George,
(Wyo.) 200 Pac. 96, 18 A.L.R. 469;

Di Vita v. Martinelli,
(Cal.) 11 Pac. (2) 423;

Hupfeld v. Wadley,
(Cal.) 200 Pac. (2) 564.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 3

You are instructed that joint adventurers are liable to third persons as partners for wrongful acts committed in conducting the joint enterprise, and each joint adventurer may be liable for the negligence of his associate or of any agent, servant, or employee of his associate joint adventurer, if the negligent act or conduct is within the scope of the joint undertaking. You are further instructed that with respect to a joint adventure involving the control and operation of a motor vehicle, all joint adventurers are liable for personal injuries suffered by others from the negligent operation of said motor vehicle including instances in which the actual negligence is that of agents and employees of the joint adventurers acting within the scope of the joint undertaking.

Mann v. Commonwealth Bond Corp.,
27 Fed. Supp. 315;

Poutre v. Saunders,
19 Wash. 2d, 561, 143 Pac. (2) 554.

Withdrawn.

Plaintiffs' Requested Instruction No. 4

You are instructed that to constitute a joint adventure, the parties must combine their property, money, efforts, skill, and knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same charac-

ter, but there must be some contribution by each co-adventurer of something promotive of the enterprise, and it is immaterial whether the property involved was individually owned before the joint venture was entered upon, so long as it was contributed and devoted to the uses and purposes of the enterprise.

30 Am. Jur. Par. 10, pages 681, 682;

Simpson v. Richmond Worsted Spinning Co.,
128 Me. 22, 145 A. 250. 63 A L R 910.

Withdrawn.

Plaintiffs' Requested Instruction No. 5

You are instructed that if you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested then and in such event, you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

You are further instructed that it is immaterial that the particular journey is a single transaction; or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand or by William Siebrand or by all of them jointly; the use of the truck and trailer as a part of a common business enterprise

makes each of them responsible for the manner in which it was operated.

Restatement of Law of Torts,
Par 491 (e), Page 1275.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 6

You are instructed that if the purpose of the journey from Phoenix to Mesa by the defendant S. J. Carroll was for the benefit of the owners of the truck and trailer, and for their joint benefit, and as a part of a common business enterprise, the owners may, under the principles of the law of agency, be regarded as the masters of the driver S. J. Carroll even though no wages or reward were paid to him.

Restatement of Law of Torts,
Par. 492, Page 1278.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 7

You are instructed that as between the parties themselves, the relationship of joint adventurers is a matter of intent, and arises when they intend to

associate themselves as such, there need be no formal agreement particularly specifying or defining the rights and duties of the parties. Such an agreement may be inferred from the conduct of the parties or from facts and circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventure may be a promise, express or implied to contribute capital or labor to the enterprise.

30 Am. Jur. Sec. 9, p. 681,
138 A L R 969.

Given.

DAVE W. LING,
Judge.

[Pencilled in margin]: Given as No. 2.

Plaintiffs' Requested Instruction No. 8

You are instructed that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured he shall answer for the damage.

You are further instructed that the rule of imputed negligence stemming from a joint enterprise, rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the

enterprise are partners or that each is an agent for the other.

Thompson v. Bell,
129 Fed. (2) 211;

Poutre v. Saunders,
(Wash.) 143 Pac. 2d. 554.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 9

You are instructed that since joint adventurers are jointly liable the persons who are damaged have their election to sue all of said joint adventurers or to sue one or more of them, and may even single out for suit a joint adventurer who personally was in no wise involved in the commission of the negligent act.

40 Am. Jur. Par. 190.

Withdrawn.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 10

You are instructed that with regard to the degree of proof all that is required in negligence cases is

for the plaintiff to present probative facts from which negligence and the causal relation may be reasonably inferred.

Nichols v. City of Phoenix,
68 Ariz. 124, 202 P. 2d 201.

Withdrawn.

Plaintiffs' Requested Instruction No. 11

You are instructed that we have under the law of this State a rule of evidence known as *res ipsa loquitur*, and you are instructed that under and by virtue of this rule that where the thing which caused the injury complained of (in the instant case the truck and trailer driven by the defendant S. J. Carroll) is shown to be under the management of the defendants or their servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care. In other words, you are instructed, when such circumstances are shown to exist, the inference arises that defendants are guilty of negligence, and, in the absence of explanation by defendants, justifies a recovery in damages by plaintiffs for such wrong, provided, that you have found there was a common business

enterprise existing among P. W. Siebrand, Hiko Siebrand and William R. Siebrand.

Tiller v. Von Pohle,
72 Ariz. 11, 230 P. 2d 213.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 12

You are instructed that under the law of this state proof of ownership is prima facie evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and is using the vehicle in the business of the owner; and you are further instructed that it is not essential that the agency presumed from proof of such ownership should be a business agency, or the service a remunerative service.

Baker v. Maseeh,
20 Ariz. 201, 179 Pac 53;

Lutfy v. Lockhart,
37 Ariz. 488, 295 Pac. 53.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 13

You are instructed that if you should find from a preponderance of the evidence that the defendants were guilty of negligence, and that their negligence

was the proximate cause of the injuries complained of, then it will be your duty to go further and assess the damages in this case and give to the plaintiff George F. Gosnell what will reasonably compensate him as disclosed by the evidence for the injuries sustained; and in arriving at that you will take into consideration the character of the injuries sustained by plaintiff, the pain and suffering which he endured as a result thereof, if any, and the pain and suffering which he in all probability may endure in the future, if any, taking into consideration his age and life expectancy.

Coppinger v. Broderick,

37 Ariz. 473, 295 Pac. 780.

Withdrawn.

Plaintiffs' Requested Instruction No. 14

You are instructed that if you should find that no circumstances existed which impaired the testimony of a witness to a particular fact, you should take such testimony as establishing the fact, and the testimony of that witness should not be disregarded.

Phoenix Blue Diamond Exp. v. Mendez,

103 Fed. 2d 66, 308 U. S. 566, 84 L. Ed. 475.

Refused.

DAVE W. LING,

Judge.

Plaintiffs' Requested Instruction No. 15

You are instructed that it is the rule of law in this state that you jurors as triers of fact in this case may disregard the unimpeached and undiscredited testimony of a party to a case on the ground that his personal interest in the result may lead him to testify contrary to the true facts of the case.

Row v. Goldberg, Inc.,

50 Ariz. 349, 72 Pac. 2d 432;

Silva v. Traver,

63 Ariz. 364, 162 Pac. 2d 615;

Clint v. Northern Assur. Co.,

71 Ariz. 44, 223 Pac. 2d 401.

Refused.

DAVE W. LING,

Judge.

Plaintiffs' Requested Instruction No. 16

If from the evidence you should find that at the time of the accident in question the truck then being driven by S. J. Carroll was owned by the defendants, P. W. and/or Hiko Siebrand, and that said Carroll then was an employee of said owner, or owners, you may infer from such evidence that the said S. J. Carroll then was acting as the agent of said owner and within the scope of his authority and was operating the automobile with the permission of the owner. You are not compelled to draw that inference if against your reason, but you may do so if your reason and discretion so dictate; and if you draw such an inference you are not required

to abandon it in the face of uncontradictory evidence but must weigh the inference and such evidence as favors it against all contrary evidence, thus to determine which, if either, preponderates.

Caljic, No. 54-E.

Refused.

Withdrawn.

Plaintiffs' Requested Instruction No. 17

Now upon the question of damages the question arises as to what effect the second injury that he received will have upon the damages. The law is this: If a person is injured, as the plaintiff, George F. Gossnell, was, and proceeds in accordance with the instructions of the doctors and in a careful manner, that is, a reasonably careful manner in getting about, and another accident happens to him which results in aggravating his injury, without negligence on his part then the added injury may be added to the original injury, and the damages may be compensation for all of the injury. If, on the other hand, the second injury was the result of the negligence of the plaintiff, disobedience of the instructions of his physicians, or lack of care on the part of the plaintiff, then the defendant may not be charged with the added injury so received.

Wagner v. Mittendorf,

232 N. Y. 481, 134 N. E. 539, 20 A. L. R.

520.

Refused.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 18

You are instructed that if you should find, from a preponderance of the evidence, that the defendants were guilty of negligence, and that this negligence was the proximate cause of the injury and damage complained of, then it will be your duty to go further and assess the damages in this case and give to plaintiffs what will reasonably compensate them as disclosed by the evidence for the injuries and damages sustained; and in arriving at that you will take into consideration the permanent injuries sustained, loss of wages, impaired earning capacity, pain and suffering, physicians', nurses' bills and hospital expenditures, if any, and the pain and suffering, medical expense which plaintiffs in all probability, and to a reasonable certainty, may endure in the future, if any, taking into consideration age and life expectancy.

Coppinger v. Broderick,

37 Ariz. 473, 295 Pac. 780;

City of Bisbee v. Thomas,

24 Ariz. 614, 212 Pac. 190;

S. A. Gerrard Co. v. Couch,

43 Ariz. 57, 29 Pac. 2d 151;

White v. Breedon,

65 Ariz. 117, 175 Pac. 2d 201;

Sim v. Weeks,

7 Cal. App. (2) 28, 45 Pac. 2d 350.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 20

You are instructed that the creation of an agency relationship arises from the consent of the parties. It is not essential that any actual contract should exist or that compensation should be expected by the agent; and the assent of the parties thereto may be either express or implied. An implied agency is an actual agency; it is a fact which is to be proved by deductions or inferences from other facts and circumstances.

If relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relation or not.

2 Am. Jur. Par. 23, Page 25 and Par. 24,
Page 26.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 21

You are instructed that when a person has suffered injury from the negligent management of a vehicle, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the vehicle without proving affirmatively that the person in charge was the defendant's servant or agent. It lies with the defendant to show that the person in charge was not his servant or agent, leaving him to show, if he can,

that the vehicle was not under his control at the time and that the accident was occasioned by the fault of a person for whose negligence the owner is not answerable. The burden of proof is cast on the owner to show, if he can, that the negligent driver was not his servant or agent.

Baker v. Maseeh,

20 Ariz. 201, 179 Pac. 53.

Given.

DAVE W. LING,
Judge.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

Defendants Siebrands' Requested Instruction No. 1

You are instructed that if you find from a preponderance of the evidence in this case, that the truck which was pulling the trailer at the time of the accident, was being driven without the consent of the owners, then you must find for the defendants Siebrands and return your verdict accordingly.

Given. [8]

Defendants Siebrands' Requested Instruction No. 2

You are instructed that a joint adventure is an association of persons to carry out a single business enterprise for a profit for which purpose they combine their property, money, efforts, skill and knowl-

edge. Each participant therein is agent for each of the others and it is essential that each have control of the means employed to carry out the common purpose.

To constitute a joint adventure there must be more than the mere fact of a share in the profits of the business. One of the most important tests of a joint adventure is whether there is a share in the losses.

Refused.

110 Federal 2nd 135, Troietto vs. G. H. Hammond Company;

Telling Belle Vernon Company vs. Krenz,
34 Ohio Appellate 499, 171 Northeastern
357;

Dumas vs. O'Leary,
277 Pac. 447, 152 Washington 205;

Estrella vs. Suarez,
134 Pac. 2nd 170, 60 Arizona 187.

Defendants Siebrands' Requested Instruction No. 3

You are instructed that parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence unless there is a community of interest in the undertaking and an equal right to govern and direct the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. In other words, in this case, in order to find that a joint adventure existed between Wil-

liam R. Siebrand, the owner of the trailer involved in the accident, and P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, you must find that William R. Siebrand had a voice and a right to be heard in the control and management of the circus and carnival and that the Siebrand Brothers had a voice and right to be heard in the control and management of the bird store, operated as a concession by Carroll for William R. Siebrand.

You are further instructed that in order to find that a joint adventure existed between the parties, last named, you must find that they had an agreement, express or implied, to share the profits and losses of the business and not an agreement for the payment of rent by William R. Siebrand to P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, and you must further find that there was such an intent of each of the parties thereto to become joint adventurers and to exercise joint proprietorship and joint control of the circus and carnival and all the concessions so owned by the said William R. Siebrand.

· Refused.

30 Am. Jur. 682, paragraphs 11 and 12,
Troietto vs. G. H. Hammond Company;

110 Federal 2nd 135, Callahan vs. Harm, 98
Cal. Appellate 568, 277, Pac. 529;

Soulek vs. Omaha,

1941 Nebraska 299, Northwestern 368.

Defendants Siebrands' Requested Instruction No. 4

You are instructed that a mere rental agreement for the rental of space does not create a joint adventure even though the consideration for the rental is based upon percentage of the gross sales.

Should you find that William R. Siebrand, in the operation of his bird store concession, was merely renting space from P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and that the consideration for the rental of space was based upon a percentage of the sales made during the operation of the concession, then you must find that no joint adventure was created.

Refused.

Dumas vs. O'Leary,

152 Washington 205, 277 Pac. 447.

Defendants Siebrands' Requested Instruction No. 5

You are instructed that an independent contractor is one who carries on an independent employment in pursuance of an agreement by which he has entire control of the work and the manner of its performance, as one who contracts to do a specific piece of work, furnishing his own assistance and executing the work in accordance with either directly, his own ideas, or a plan previously given to him by the person for whom the work is done without being

subject to the orders of the latter with respect to the details of the work.

You are further instructed that should you find that S. J. Carroll was an independent contractor and not an agent of William R. Siebrand in the operation of the bird store concession, then you must return a verdict for the defendants, P. W. Siebrand, Hiko Siebrand and Siebrand Brothers Circus and Carnival.

Given.

27 Am. Jur., page 482, A.L.R. T28;

Moody vs. Industrial Accident Commission,
204 Cal. 668, 269, page 542.

Defendants Siebrands' Requested Instruction No. 6

You are instructed that William R. Siebrand was the owner of the trailer involved in the accident and that the name Siebrand Brothers Circus and Carnival painted on the trailer does not of itself affect the ownership of William R. Siebrand, in said trailer.

Given.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. I

You are instructed that upon plaintiffs rest the burden of showing by a preponderance of the evidence that it was the negligence of the defendant which caused the injury. Unless plaintiffs make this proof they cannot recover. A mere surmise that there may have been negligence on the part of the defendant S. J. Carroll, or the mere fact that an accident happened to the plaintiffs, does not entitle the plaintiffs to a verdict.

Armstrong v. Day,

103 Cal. App. 465, 284 Pac. 1083.

Given. [9]

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. II

You are instructed that the mere fault that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was possible for such an accident to be avoided. They simply denote an accident that occurred without

having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Merry v. Knudsen Creamery Co.,
Cal. App., 211 Pac. 2d 905.

Given.

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. III

You are instructed that the driver of an automobile or truck is not the insurer of the safety of others, and in case they exercise that degree of care for the safety of others which is prescribed by the statute and such as ordinarily prudent persons usually use under the same or similiar circumstances, then they have discharged their duty and are not lacking in ordinary care.

Thiel v. Juelling, Circuit Court, Marathon
County, Wisconsin.

Given.

[Endorsed]: Filed April 16, 1954.

In the United States District Court
for the District of Arizona

Phoenix Civil Docket Civ-1875 PHX

Title of Case

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND d.b.a.
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

ENTRY OF JUDGMENTS

Filings-Proceedings

Apr. 16, 1954; 5:30 p.m.

Judgment entered on the verdict in favor of plaintiffs George F. Gossnell and Estella Gossnell against defendants P. W. Siebrand & Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, in the sum of \$95,000.00.

Apr. 16, 1954; 5:30 p.m.

Judgment entered on the verdict in favor of plaintiffs George F. Gossnell and Estella Gossnell against defendant S. J. Carroll, in the sum of \$100.00. [13]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF
JUDGMENT

Come now the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and move the Court to strike from the verdict against the above-named defendants all damages in excess of the sum of One Hundred Dollars (\$100.00) for the reason that any damages in excess of the amount of One Hundred Dollars (\$100.00) is surplusage and improper.

/s/ W. FRANCIS WILSON,
Attorney for the Siebrands.

Authority:

Pinnix vs. Griffin 221 North Carolina 348
20 Southeastern 2nd 366.

Notice

To: William P. Mahoney, Jr., and J. C. Raineri,
Attorneys for Plaintiffs:

You and each of you will please take notice that the foregoing motion is set down for arguing on the 10th day of May, 1954, at 10:00 o'clock a.m., before the above-entitled court.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed April 26, 1954. [15]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and move the Court that the verdict of the jury, in the above-entitled cause, be set aside as to the defendants Siebrand and that the judgment entered on the verdict be vacated and set aside as to the defendants Siebrand, and that a new trial be granted to the defendants Siebrand for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. There is no evidence that the defendants, P. W. Siebrand and Hiko Siebrand are guilty of negligence.
4. The Court erred in denying the above-named defendants' motion to direct a verdict in their favor at the close of the plaintiffs' case.
5. There is not sufficient or substantial evidence tending to support the amount of the jury's verdict.
6. The verdict is excessive and appears to have been given under the influence of passion and prejudice.
7. The Court erred in giving to the jury plaintiffs' requested instructions Nos. 2, 5, 6, 7, 8, 11, 12, 18, 20 and 21, over the defendants' objection.

8. The Court erred in failing to give defendants' requested instructions Nos. 2, 3, and 4, concerning joint adventure.

9. The verdict was founded upon surmise, conjecture, speculation, and inference. [16]

10. The Court erred in admitting irrelevant, incompetent, and prejudicial testimony offered by the plaintiff over defendants' objection.

11. The Court erred in failing to instruct the jury that statements made several days after the accident, by P. W. Siebrand, alleged to constitute admissions of liability were not applicable to Hiko Siebrand nor defendant Carroll.

12. The Court erred in allowing evidence of future medication and hospitalization in that there was no evidence that the defendant, George Gossnell, was not healed at the time of trial inasmuch as no examination had been made of him by any doctor since March 1, 1954, except by Dr. Bishop, who testified that Gossnell was well at the time of trial.

Dated this 26th day of April, 1954.

/s/ W. FRANCIS WILSON,
Attorney for Defendants P. W. Siebrand and Hiko
Siebrand.

Authorities in support of Motion:

Rule 59 of Federal Practice and Procedure.

Notice

To: William P. Mahoney, Jr., and J. C. Raineri.
Attorneys for Plaintiffs:

You and each of you will please take notice that the foregoing motion is set down for arguing on the 10th day of May, 1954, at 10:00 o'clock a.m., before the above-entitled court.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

MOTION FOR SATISFACTION OF
JUDGMENT

Comes Now the defendant S. J. Carroll in the above-entitled and numbered cause, by his attorneys, Gibbons, Kinney & Tipton, and respectfully moves the Court that satisfaction be entered of record of the judgment heretofore rendered and entered in the above-entitled and numbered cause on or about the 16th day of April, 1954, in favor of the plaintiffs and against the said defendant S. J. Carroll, and represents to the Court that the defendant S. J. Carroll has heretofore tendered to the plaintiffs the amount of said judgment which was refused and has presently tendered said amount to the Clerk

of the above-entitled Court; and that this motion is based upon the records, files and proceedings in said cause.

Dated this 29th day of April, 1954.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant. [17]

Notice of Motion

To: George F. Gossnell and Estella Gossnell, his wife, Plaintiffs, and Wm. P. Mahoney, Jr., and J. C. Raineri, Attorneys for Plaintiffs; P. W. Siebrand, Hiko Siebrand d.b.a. Siebrand Brothers Circus and Carnival, Defendants, and W. Francis Wilson, Attorney for Said Defendants:

You, and Each of You, will please take notice that the above motion will be presented to the Court at the next regular call of the motion calendar, or as soon thereafter as the same may be heard.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant
S. J. Carroll.

Affidavit of mail attached.

[Endorsed]: Filed April 29, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY—MAY 17, 1954

Motion to Strike Portion of Judgment and Motion for New Trial, of Defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival; and Motion for Satisfaction of Judgment, of defendant S. J. Carroll, come on regularly for hearing this day.

Wm. P. Mahoney, Esq., and Joseph Raineri, Esq., appear for the plaintiffs. Francis Wilson, Esq., and Howard Gibbons, Esq., appear for the respective defendants.

Said motions are argued by respective counsel.

It Is Ordered that said Motion to Strike Portion of Judgment, and Motion for New Trial, of Defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, be and they are denied.

It Is Ordered that said Motion for Satisfaction of Judgment, of Defendant S. J. Carroll, be and it is denied.

Francis Wilson, Esq., now moves for further stay of execution of judgment on behalf of defendants Siebrand.

It Is Ordered that the execution of judgment be stayed for a period of thirty days from this date.

(Docketed May 17, 1954.) [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Carroll)

Notice is hereby given that S. J. Carroll hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying defendant Carroll's motion for satisfaction of judgment made and entered in the minutes of said Court on the 17th day of May, 1954.

Dated this 16th day of June, 1954.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant,
S. J. Carroll.

[Endorsed]: Filed June 16, 1954. [19]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

I, the undersigned, have deposited with the Clerk of the Court the sum of Two Hundred and Fifty Dollars (\$250.00) as cash bond for the cost bond on appeal in the above-entitled matter.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed June 16, 1954, from the order of this Court, denying satisfaction of judgment, entered May 17, 1954, if

the defendant shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ S. J. CARROLL.

[Endorsed]: Filed June 16, 1954. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL
(Siebrand)

Notice is hereby given that P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of April, 1954, in favor of the plaintiffs in said action and against defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and from the whole thereof, from the order denying defendants' motion for a new trial made and entered in the minutes of said Court on the 17th day of May, 1954, from the order denying defendants' motion to strike a portion of the judgment made and entered in the minutes of said Court on the 17th day of May, 1954, and from the order denying defendant Carroll's motion for satisfaction of judgment made and entered in the

minutes of said Court on the 17th day of May, 1954.

Dated this 14th day of June, 1954.

/s/ W. FRANCIS WILSON,

Attorney for Defendants P. W. Siebrand and Hiko Siebrand.

[Endorsed]: Filed June 14, 1954. [23]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, have deposited with the Clerk of the Court the sum of Two Hundred Fifty Dollars (\$250.00) as cash bond for the cost bond on appeal in the above-entitled matter.

The condition of this bond is that whereas the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed June 10, 1954, from the judgment of this Court entered April 16, 1954, if the defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ P. W. SIEBRAND,

/s/ HIKO SIEBRAND.

[Endorsed]: Filed June 14, 1954. [24]

In the United States District Court,
District of Arizona
No. Civil 1875

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND, d.b.a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Proceedings had and evidence taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, and a jury, in the courtroom of the United States Courthouse, at Phoenix, Arizona, commencing on the 13th day of April, A.D. 1954, at ten o'clock a.m.

Present:

MR. WILLIAM P. MAHONEY, JR.,

MR. J. C. RAINERI,

Appeared for Plaintiffs.

MR. W. FRANCIS WILSON,

Appeared for Defendants P. W. Siebrand
and Hiko Siebrand.

GIBBONS, KINNEY & TIPTON, by

MR. HOWARD W. GIBBONS,

Appeared for Defendant S. J. Carroll.

The Clerk: Case Number Civil 1875 Phoenix, George F. Gossnell, et ux., versus P. W. Siebrand, et al., for trial.

The Court: Are you ready, gentlemen?

Mr. Raineri: Plaintiff is ready.

Mr. Wilson: Defendant is ready.

The Court: Call the names of eighteen jurors. As your names are called, come forward.

(Whereupon 12 jurors were selected and sworn to try the issues.)

The Court: You may make your opening statements.

(Whereupon Opening Statements were made to the Jury by Mr. Raineri, Mr. Wilson, and Mr. Gibbons.)

The Court: We will have our morning recess at this time. During the recess you are not to discuss the case among yourselves, or with anyone else. Also avoid forming or expressing an opinion on any subject connected with this case. The Court will stand at recess for five minutes.

(A recess was had.)

The Court: Call your first witness.

(The following testimony was introduced on behalf of the Plaintiffs.) [2*]

Mr. Raineri: We call Mr. Gossnell, your Honor.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

GEORGE F. GOSSNELL

plaintiff herein, called as a witness, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you please state your full name?

A. George F. Gossnell.

Q. Where do you live, Mr. Gossnell?

A. Fort Dodge, Iowa.

Q. And how old are you? A. I am 65.

Q. Now, directing your attention to the 20th day of February, 1953, that is approximately a year ago this last February, or fourteen months ago at this time, approximately, will you tell us where you started out from in the early morning of that day, and at about what time?

A. Well, we left Tucson, Arizona, about 7:30 in the morning, on our way to visit my daughter in California. She was in Ontario.

Q. Ontario?

A. Ontario, California. We were going by way of Phoenix before we went home to Fort Dodge.

Q. In other words, then, on your way from [3] Tucson to Ontario, California, it was necessary for you to come through Phoenix, is that right?

A. I don't know as it was absolutely necessary, but that was the route we had planned. We had never seen Phoenix, and we wanted to go through Phoenix and see the city.

Q. Now, directing your attention to approxi-

(Testimony of George Gossnell.)

mately ten o'clock in the morning of that day, will you tell us about where you were driving at that time?

A. Well, I would say about 10 or 10:15 I remembered entering the town of Phoenix.

Q. The town of Phoenix?

A. I mean the city or town of Tempe. Going through, I have no remembrance much of what happened, just driving through as an ordinary person would on the right side of the road, and the next thing I saw was just a yellow flash in front of me, and that was as far as my knowledge runs as to what happened.

Q. Do you know where you were driving at that time?

A. I know I had passed the Tempe sign.

Q. Do you know whether you were driving on a highway, or what you were driving on at that time?

A. Well, I was on the regular highway from [4] Tucson to Phoenix through Tempe. I don't know what the number of it is, or anything like that.

Q. Maybe I didn't make myself clear. Do you recall whether you were on a bridge or not at that time?

A. No, I do not.

Q. Do you know what kind of a road you were driving on?

A. Well, I was driving on a paved road. It must have been, because it was a general road coming in. It had been all the way.

Q. Now, has this accident in any way affected

(Testimony of George Gosnell.)

your remembrance of things for that particular day?

A. Well, my memory is gone for maybe five to ten minutes before the accident, something like that.

Q. I mean, is it hard for you now to recall facts surrounding that accident?

A. Yes, it is. I remember very little of it. I have heard a lot from hearsay, and of course that confuses me with what really happened.

Q. All right. Now, who was riding with you in the car at that time?

A. My wife was in the front seat.

Q. What kind of a car were you driving?

A. I had a Buick 1950 Special sedan. [5]

Q. You were driving that car?

A. I was driving, yes, sir.

Q. And your wife was riding in the front seat with you?

A. She was on the right side.

Q. Was there anybody else riding with you at that time?

A. Yes, I had a passenger in the back seat who was driving over with me, because he wanted to see a cousin, I believe it was, in Arcadia.

Q. California?

A. California. That was about twenty miles beyond where I was driving, something like that.

Q. Now, what do you first recall after the accident, what do you first remember?

A. The first I recall after the accident is when I woke up in a bed, and somebody showed me a

(Testimony of George Gossnell.)

picture of a big bandage over my eye. That was my first remembrance of anything. That was the next day sometime.

Q. You mean you looked in a mirror, is that right?

A. Yes, I wanted to see how badly my face was damaged.

Q. This happened on a Friday, was it?

A. Friday, February 20th. [6]

Q. Now, where were you hospitalized, do you remember that?

A. Well, it was at Tempe Clinic, or Tempe Hospital, Dr. Pohle's hospital. Now, I don't know the name of it.

Q. Are you able to remember about how fast you were driving? Does that come back within the realm of your memory now?

A. Well, I was driving about 25 miles when I hit a town. I am not a fast driver, never have been a fast driver.

Q. How many years have you been driving a car?

A. Oh, since 1920. Possibly 34, 5 years.

Q. All right, now, Mr. Gossnell, for the past 13 or approximately 14 months, tell us what your condition has been?

A. You mean a detailed——

Q. Well, just tell us how you have spent your time. Have you been up and around, and what has been the situation?

A. I spent the time from February 20th to August 11th in bed in a hospital. Then I was home

(Testimony of George Gossnell.)

for approximately two months. I had a hospital cot at home. I was able to get up maybe ten minutes at a time and try to use crutches. But that didn't work. And October the 25th I had to go back to the [7] hospital, and they put the cast on.

Q. Are you still in a cast at the present time?

A. Up to my ribs, yes.

Q. Are you a little upset now? Do you want a few minutes? Are you composed enough?

A. No. I could go on. My emotions just kind of get away from me. I guess maybe I am a sissy.

Q. Are you in a cast at the present time?

A. Yes.

Q. And then except for that ten minutes or so a day that you were up and around, you have been in bed practically all the time, is that right?

A. I got so I could get up a little bit in a wheelchair to sit out, oh, for an hour a day, during the time I was home, the two months I was home.

Q. Now, if I understand your testimony correctly, there was a period of time from May, was it, to October, that you weren't in a cast, is that right?

A. No, it was from August. Yes. From my operation, open reduction in May 25th?

Q. Yes.

A. Until October 25th, I wasn't in a cast. I had an open reduction on my leg.

Q. Tell us at that time what support was given to your leg in place of a cast?

A. Well, they have two steel pins through [8]

(Testimony of George Gossnell.)

the, or below the break, and two above the break, with a steel plate they are attached to, and they hold permanently in there while the bone is attempting to grow.

Q. All right, now, did they remove those pins?

A. They removed those the 25th of October.

Q. Tell us what if anything happened when those pins were removed?

A. Well, of course I was in the hospital at the time, and the morning of the 27th when I went to take a bath, why, my leg doubled up on me. In other words, it hadn't calcified as much as they thought it should or had when they took the pins out, and so my leg doubled up on me, and the only thing they could do then was to put me in a cast, because they couldn't put new pins in.

Q. When you say your leg doubled up on you, you mean it rebroke again?

A. It didn't completely break; the bone bent so it had to be straightened out. It hung together in spots.

Q. But there was a sort of break there?

A. The break was clear through, except in a very few spots that the fiber or the calcium had helped.

Q. To remedy that situation, then, they put [9] you in a cast, and you are still in a cast, is that right?

A. That is right.

Q. Now, Mr. Gossnell, prior to the time that you sustained this injury in this automobile acci-

(Testimony of George Gossnell.)

dent of February 20th, 1953, what type of employment were you engaged in?

A. Well, I was a city salesman for the Messenger Printing Company. That is our daily paper.

Q. Is that in Fort Dodge?

A. Yes, in Fort Dodge, Iowa. That is our daily paper, and they have a bank and office supply that goes with it. I sell the bank and office supply stationery and any forms of printing that they happen to need.

Q. How long did you follow that type of employment?

A. I had been with them from 33 to 34 years.

Q. And were you still so employed at the time this accident happened?

A. I was. I was on my vacation.

Q. Have you worked at that employment since this accident? A. No.

Q. All right. What were your average annual earnings from that employment? [10]

A. They run approximately \$7,000 a year, as an average. Sometimes larger, sometimes smaller, but seven thousand would be a pretty fair average.

Q. Now, in connection with this accident, have you incurred medical expense and hospital bills?

A. A whole lot more than I can appreciate, yes. I say, a whole lot more than I can afford.

Mr. Wilson: I object to that as not responsive.

The Court: All right. It isn't.

Q. (By Mr. Raineri): Have you paid those bills? A. I have paid bills, yes.

(Testimony of George Gossnell.)

Q. Have you paid all of the bills?

A. I haven't paid the doctor bills.

Q. And for what reason?

A. Well, I have been—Not knowing exactly how long I am going to be in this condition, I have been afraid to use the last little remnants of what I have left.

Q. And when you say remnants, what are you talking about?

A. Of my savings. It is a case of——

Mr. Wilson: Just a minute. I object as not responsive.

The Court: Yes. [11]

Q. (By Mr. Raineri): Now, did you have special nurses in connection with your care at the hospital?

A. I had special nurses around the clock at Tempe for some time, and I also had special nurses at Fort Dodge when I was home.

Q. How did you happen to have these special nurses?

A. That was under the doctor's orders. They ordered them for me.

Q. Will you describe these injuries you sustained in this accident to us?

A. Well, I had a broken ankle, and a shattered knee, a compound fracture of the hip, and two broken ribs, and a skull fracture from my eye, up here. (Indicating.)

Q. Now, Mr. Gossnell, this injury, this skull fracture that you had, that has affected your

(Testimony of George Gosnell.)

memory, or you can't remember things like you could?

Mr. Wilson: I object to that as leading and suggestive.

The Court: He may answer.

The Witness: Yes, sir.

Q. (By Mr. Raineri): Now, what was the condition of your health before this particular accident? What if any ailments [12] of any kind did you have before this accident?

A. I had never had any sickness. I had had some, oh, I had had an operation for hernia, operation for tonsils, but my health was very good, because I went to the hospital once a year to be checked on. I was very careful about that, x-ray examinations, and everything. I played golf possibly two or three times a week, on Saturday and Sunday. I bowled a little bit. So my physical condition has been very good.

Q. Now, tell us how you felt. I mean, while you have been in bed all these 13 months, or better, just tell us whether you experienced any pain?

A. Well, the nine weeks I was in Tempe I had pain practically all the time from the breaks. Then I had an embolism, and I had two or three other, what he called complications—I believe the doctor knows more about that than I do—that would knock me out for about eight or ten days' time. They were stomach complications of some kind.

Q. Are you through?

(Testimony of George Gosnell.)

A. Well, I was going to say I had been there the nine weeks. It was more or less that I was suffering all the time, because the majority of the time they put two and three hot packs a day on me, taking medicine regular, and everything like that [13] for the different ailments.

Q. Now, state whether or not from and after that time you have experienced any pain down to the present date?

A. Well, I got home April 25th, and I was operated on May 25th. That one month was used as sort of a build-up period. I had gone down in weight an awful lot, and the doctors were building me up so I could stand an operation. Then the 25th I had an operation, and it was very painful, and it was very painful for months getting up. I mean, being carried up out of bed, and being put in a wheelchair and having to sit in a wheelchair, and things like that. There was a great deal of pain connected with it, possibly not all the time, but a good share of the time, until I got home, and then the brace on my leg began to rub a little bit. That caused some trouble and pain, and things like that.

So it has been practically that almost all the time. I have always been in pain or uncomfortable.

Q. When you speak of an embolism, will you tell us what you meant when you said that?

A. All I know is what they tell me, is that it is a blood clot forms.

(Testimony of George Gosnell.)

Mr. Wilson: I object to the answer as calling for [14] hearsay.

The Court: Yes.

Mr. Raineri: All right, we will withdraw the question. Your witness.

Cross-Examination

By Mr. Gibbons:

Q. Mr. Gosnell, how long were you hospitalized in Tempe?

A. I was in Tempe nine weeks, I believe.

Q. And who were your doctors there at that time?

A. Doctor Pohle, and Dr. Hartman from the Grunow clinic.

Q. How many times did you see Dr. Hartman?

A. Either three or four times. I believe it was three times.

Q. Was your leg put in a cast at that time?

A. No, it was put in traction.

Q. And no cast was applied, is that correct?

A. Well, it was all wrapped up, and everything, in cloth, and it was in a cast a good share around the knee, and things. Now I don't remember too well back 14 months. I know I should know it.

Q. Now, at the end of the nine weeks in Tempe, you testified you returned to your home in Fort Dodge, Iowa, is that correct?

A. Yes, that is right. [15]

Q. And you were there again hospitalized in a hospital in Fort Dodge?

A. That is right.

(Testimony of George Gossnell.)

Q. What hospital was that?

A. That was St. Joseph's Mercy Hospital at Fort Dodge.

Q. Was a cast put on your leg there at that time?

A. No, the cast was put on my leg at Tempe Hospital, so I could return to Fort Dodge.

Q. In other words, they did put a cast on your leg at Tempe? A. That is right.

Q. Do you know when that was?

A. I would say offhand that was the Monday before the Saturday that I left, so I left on the 25th. That must be the 20th. I wouldn't absolutely swear to it, but I would say the cast was put on the 20th of April at the Tempe Hospital.

Q. How long did that cast remain on your leg?

A. That cast remained on my leg until it was taken off the 25th of May, when I was operated on.

Q. Now, by operated on, do you mean that the——

A. The open reduction, is what they call it.

Q. You mean they put a brace on, don't you?

A. Well, they put about a eight or nine inch [16] cut up your leg, and run the four pins through the bone. Oh, no, the leg was cut open, and two pins run clear through the bone there, and two below, with a steel plate on top.

Q. Well, what really happened, Mr. Gossnell, was that they took the cast off?

A. That is right.

(Testimony of George Gossnell.)

Q. And put in this steel support or brace for your leg, is that right, to hold it together?

A. They took my cast off, and they put the brace of steel pins in, yes.

Q. Now, who performed that?

A. That was Dr. Fred Knowles.

Q. Do you know what that system of treating a broken leg is called?

A. No reason why I should know. No.

Q. I just asked you, sir. And I think you testified, then, that this steel brace with the pins remained on your leg until——

A. October 25th.

Q. October 25th? A. That is right.

Q. And you said at that time you were taking a bath and the leg doubled up?

A. No. I was taken to the hospital. I had x-rays taken, and the x-rays showed that there was [17] growth there, and they decided that the growth was enough to have the pins removed. When they removed the pins, two days afterwards the leg, well, it bent on me.

Q. Bent, did you say it bent on you?

A. The bone.

Q. Didn't you say, Mr. Gossnell, that you went to take a bath when that occurred?

A. I didn't say I went to take a bath, no. I was in bed and the nurse was giving me a bath, yes.

Q. The nurse was giving you a bath——

A. Was giving me a bath.

Q. And what did you do, turn over?

(Testimony of George Gossnell.)

A. I turned over. I had these bars up here to turn on, and one person will stand there, the one giving me a bath will stand there, and they turned me over on this leg, and this one on this side holds my leg up in the air while they bathe me.

Q. That is when the leg bent, when they turned you over, is that right?

A. When they turned me over is when the leg bent or broke.

Q. And it was necessary to put your leg back in a cast after, wasn't it?

A. It was necessary to put my leg in a cast.

Q. Who applied the cast at that time, sir? [18]

A. Dr. Fred Knowles.

Q. Your ankle has completely healed now, has it not?

A. As far as I know.

Q. And the injury to your knee, has that healed?

A. That was healed, but it has left a very stiff knee.

Q. Well, you haven't been able to walk much yet on it, have you?

A. I tried for two months on crutches, tried to lift it, so I know it left a stiff knee.

Mr. Gibbons: That is all.

Q. (By Mr. Wilson): Mr. Gossnell, this Dr. Fred Knowles put what is known as a Knowles bridge on your leg, didn't he?

A. Yes. I had a book showing that.

Q. And you knew him previously?

A. Well, I knew him like I know other doctors or other customers in town that I know of.

(Testimony of George Gossnell.)

Q. This was a special kind of treatment that he had invented, was that true? That is what they told you, wasn't it?

A. Called a Knowles bridge. There wasn't any special treatment, or anything.

Q. Did you know of any other doctor who ever used that method? [19]

A. No reason why I should. I had only had one broken leg.

Q. I believe you stated you had a broken hip. You didn't mean that, did you?

A. How is that?

Q. You didn't mean you had a broken hip, did you?

A. I didn't mean I didn't?

Q. You didn't mean you had a broken hip, did you?

A. I had a broken femur. Did I say hip?

Q. Yes. A. I am sorry.

Q. The femur is the bone that connects the hip with the knee?

A. The femur is the one below, yes.

Q. Where did you play golf in Fort Dodge?

A. Well, I played golf at various places. They have, like most cities have that size, they have a few public places. They have a couple of clubs.

Q. The question is, where did you play golf?

A. I am telling you where I played, in a couple of public places. I played golf at the Riverview, and at the Fort Dodge Country Club.

Q. Were you a member of each place?

A. I was a member of the Fort Dodge Country

(Testimony of George Gossnell.)

Club. It was paid by the Messenger Printing Company, who was my employer. [20]

Q. How long were you such a member?

A. Well, that is hard to say how long I was a member. I have been a member for 10, 12, 15 years.

Q. I believe you testified under oath concerning this action in another instance, that you had paid all the doctor bills, is that not correct?

A. Not that I remember that I did. I remember no such question.

Q. You have the cancelled checks showing you paid the doctor bills, do you not?

A. The cancelled checks showing—No, sir, we have not.

Q. Where are they?

A. The doctor bills have not been—The doctor bills in Tempe have been paid, yes. The doctors, I mean the doctors in Fort Dodge have not been paid.

Q. Since you have been——

A. Now, I am saying that in the way that I have written no checks. My wife has tended to all business transactions, but to the best of my knowledge I will say that two doctors at Fort Dodge have not been paid.

Q. Since you have been in Fort Dodge, since this accident occurred, your company has carried on your business for you, have they not?

A. They have told me—I work on commission from [21] the Messenger Printing Company, and I have a list of possibly 30 to 32 customers in town

(Testimony of George Gossnell.)

who are designated as my own personal accounts. In other words, none of the other salesmen from Messenger can call them.

They agreed to give me the commissions coming in from these people while I was in this condition, but they did not know for how long they would continue to do so, and they did last year.

Q. And are they still doing it?

A. I don't know. I haven't been home since the middle of February. I have drawn it from them this year, that is all.

Q. When you returned to Fort Dodge from Tempe, how did you go? A. What was that?

Q. When you returned to Fort Dodge from Tempe, how did you go?

A. I went by an ambulance plane.

Q. Did you pay for it? A. I did.

Q. What did it cost? A. My wife did.

Q. What did it cost?

A. It has cost something over \$900. I don't know the exact figures. [22]

Q. Now, how do you know that your memory was affected by the skull fracture? How do you know that there is something you don't remember?

A. I certainly remember about where I was, or something like that.

Q. No, I mean your statement that your memory is affected by your skull fracture. How do you know that you don't know something that you don't know?

(Testimony of George Gossnell.)

A. That is rather a complex question, I would say.

Q. Would you just simply tell the court and jury how it is you know that your memory is affected by the skull fracture?

A. Simply because I have no memory of the accident.

Q. Excuse me——

A. And I was going to say, and little things slip, even. I forget little things right now, I mean, at different times.

Q. Now, of your own knowledge, Mr. Gossnell, things that you know of your own knowledge, and not what people have told you, do you know of anything that Pete Siebrand or Hiko Siebrand, or Siebrand Brothers Circus and Carnival did or failed to do that caused your present condition?

Mr. Raineri: I will object to that, your [23] Honor. It hasn't been shown that this witness is qualified. He was injured.

The Court: The answer is obvious. He doesn't know.

The Witness: I sure don't. Would you repeat the question?

The Court: You don't have to answer.

Q. (By Mr. Wilson): Do you know of your own knowledge of anything that Mr. Carroll did or failed to do that caused your present condition?

A. I have never seen Mr. Carroll. I have never seen Mr. Siebrand, except in the courtroom here.

Q. Do you know of any negligent thing they

(Testimony of George Gossnell.)

did that caused this thing, except what you have heard?

A. All I know about is from what I have heard. I was in no condition to——

Q. Your treatment was almost entirely by Dr. Pohle while you were in Tempe?

A. Well, he had assistants there.

Q. But under his direction?

A. Oh, yes. The head of the clinic, the head of the hospital.

Q. He runs a little private hospital, doesn't he?

A. I don't know. It is his hospital, I [24] understand.

Q. You know nothing of his special qualifications in connection with your broken leg?

A. Not a thing.

Q. You stated you have never seen Mr. Siebrand? A. Except in court.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Raineri:

Q. Mr. Gossnell, how did you happen to take— You were asked questions concerning an ambulance plane. State to the jury why you took this ambulance plane back to Fort Dodge?

A. When Dr. Hartman came down to see me the last time, I believe that was a Saturday preceding the day they put me in a cast, and they said he

(Testimony of George Gossnell.)

couldn't operate on me because I had some drainage in the leg as yet.

Mr. Gibbons: I object to the hearsay statement.

The Court: Well, Mr. Wilson wanted to know about the cost of this plane.

The Witness: I was just leading up to it. So they put me in what they call a double spiker cast with your legs spread completely apart, with a bar between your knees holding you in that position. The bar is cemented in plaster of paris, [25] so you can't move at all. They would not take me on the train because they couldn't get me in the passageway. I tried to go on the, well, the planes to Kansas City and on. First they agreed they would take me if I would have five seats. I had to occupy four seats, because I was in a lying down position, could not sit up.

I agreed to this, but when they telephoned or telegraphed Los Angeles, they turned it down. They said they would not take anybody in that condition, so I could not take the train, I could not take the plane.

Somebody said that Mr. Moore here had an ambulance plane, and so I contacted him. That was the only way left to go home, and it was a case I wanted to get home at that time, or as quick as I could, because being pretty near three months out away from home is bad enough without being able to get back when you want to. So I thought I would take the opportunity to get home on the plane. That was the only way I could make it.

(Testimony of George Gossnell.)

Mr. Raineri: That is all.

The Court: Is that all?

Mr. Wilson: Yes.

Mr. Gibbons: Yes.

(Witness excused.)

The Court: We will suspend until 2:00 [26]
o'clock.

Keep in mind the court's admonition.

(Whereupon at 12 o'clock noon, a recess was
taken until two o'clock p.m. of the same
day.) [27]

Tuesday, April 13, 1954; 2:00 P.M.

The Court: Call your next witness.

Mr. Raineri: I call Mrs. Gossnell.

ESTELLA L. GOSSNELL

called as a witness in behalf of the plaintiffs, having
been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you state your full name, please?

A. Estella L. Gossnell.

Q. And where do you live, Mrs. Gossnell? [28]

A. Fort Dodge, Iowa.

Q. Will you talk a little louder so the Court and
jury and counsel here can hear you plainly?

A. Yes.

(Testimony of Estella L. Gossnell.)

Q. How long have you resided in Fort Dodge, Iowa? A. Since 1914.

Q. Now, directing your attention to the 20th day of February, 1953, will you tell us where you were on that day, where you started out from in the morning, and just what occurred?

A. Yes, sir.

We left Tucson around seven-thirty, probably, to go to Phoenix. We were going to see my daughter in Ontario, California, and we were going by way of Phoenix, to spend a few days there before we started for home. We left, well, after breakfast. It was around seven-thirty.

And we came into Tempe, I remember making that turn and going through the town, going on the bridge, and just going along in the traffic.

There was traffic on both sides, and this trailer, I noticed it off to the left here a little ways, just about like that door would be, and all of a sudden it just swerved right into us. And there was a terrific crash. [29]

And it pushed the car over, our car over just close enough to the sidewalk that goes along that concrete rail, pushed the car over, and, well, there was just a lot of falling glass and crashing, and my husband and I just bounced. I just went up in the air and came down again.

I was injured. I was hurt, but I looked down, and my husband was lying just right across the seat, with his head close to me. I must have been

(Testimony of Estella L. Gossnell.)

sitting—or else I was shaken over to the side of the car——

Q. Pardon me. What seat were you riding in?

A. I was in the front seat with my husband.

Q. Go ahead, Mrs. Gossnell.

A. And his face was all covered with blood, and that was the left side. It just opened like a rose petal, this gash here. And I noticed all the blood, and rolled down the window, and saw that I couldn't get the door open, rolled down the window and screamed for help, and by that time there was a lot of people there, and they all, of course, rushed to the scene, and in just a minute, well, it was just a few minutes, maybe five or ten minutes, and the ambulance came.

And in the meantime, the men around in the various cars that were on the bridge came and [30] raised the car up so that they could pull the door open, open the door so that—it was stuck against the concrete sidewalk—raised it so that they could get the door open, so that they could get my husband out.

If there hadn't been any sidewalk, we never could have got that door open.

Then we were taken to the hospital. We had to go to the closest one.

Q. What hospital were you taken to?

A. The Tempe Clinic Hospital.

Q. How long did you remain there?

A. We were there until the 25th of April.

Q. Approximately two months?

(Testimony of Estella L. Gossnell.)

A. Yes, a little more.

Q. Were you hospitalized along with your husband?
A. Yes, I was hospitalized.

Q. What injuries did you sustain, if any?

A. Well, I had some broken ribs, a couple broken ribs, and my chest bothered me. The bouncing sort of made a jamming, I guess, that is what the doctor said it was; and bruises all over, and black and blue marks.

My arms hurt so that it was hard for me to get in and out of bed. I could get on my [31] feet—when I could get on my feet I was all right, but it was very hard getting in and out of bed. And, of course, I felt like I should be up to be with my husband, because he didn't know whether I was alive or not.

Q. What doctor attended you, Mrs. Gossnell?

A. Dr. Pohle.

Q. Is that the same doctor that was attending your husband?
A. Yes.

Q. Now, back in Fort Dodge, Mrs. Gossnell, were you employed? Did you work?

A. Yes, I worked in the drapery department in a department store.

Q. You worked in a drapery department in a department store?
A. Yes.

Q. How much were you earning a month?

A. About \$150.00.

Q. Have you worked at all since this accident?

A. No, I haven't.

(Testimony of Estella L. Gossnell.)

Q. Was that because you have been taking care of your husband?

A. Well, I wasn't really able to work when we got home. I kept going as long as I was in Tempe, I kept up, but I was run down, and didn't realize it [32] until I got home.

When I got home, I found I couldn't, just couldn't for a while, and I had to get myself back in condition again.

And my leave was to be up the—I could go back the first of June, that was to be the end of my leave, the first of June.

Of course, I was not able to then. Then they extended it for me until October. By October—my husband came home the 11th of August, and I took care of him there, because he was able, he was well enough that he could go home for a while, and I could take care of him there. So then I couldn't go back in October.

Now they have extended my leave until May 1st. That is three weeks from now.

Q. Do you know the defendant, P. W. Siebrand? A. Sir?

Q. Do you know the defendant, P. W. Siebrand?

A. Yes, I met Mr. Siebrand. He came to see me on several occasions.

Q. And where did he come to see you?

A. In the reception room of the hospital, and then once I talked to him in a corridor.

Q. And when was the first time he came to see you? [33]

(Testimony of Estella L. Gossnell.)

A. Whether it was the first or the second day after, I don't know, because I was too sick and hurt, and probably shocked, that I don't remember. It was soon. It could have been the first day. It could have been the second day.

Q. Why did Mr. Siebrand first come to see you at the hospital?

Mr. Wilson: I object as calling for a conclusion.

Q. (By Mr. Raineri): Did he state why he was coming?

A. Well, he came to see how we were getting along, and how badly my husband was hurt, how I was feeling, and on the first occasion he was, he said he was very sorry that it all happened, and if there was anything he could do. He did ask me if I needed money. I said not at the moment.

Q. Was there any other——

A. Then he asked me, he said, "Can you drive?" I said, "Yes, I drive a car."

He says, "Well, I will buy you a new car, and you can take your husband home."

And I said, "Mr. Siebrand, Doctor Pohle said my husband wouldn't set his foot on the ground for three months." And there was nothing more said about that. [34]

Q. Now, you testified that P. W. Siebrand was over to see you more than once?

A. Yes, he was there once in the reception room I can't remember definitely when it was, but it was, I would say, a few days, or it could have been a week, I don't know.

(Testimony of Estella L. Gossnell.)

My husband was going through the crisis that first ten days, and a day meant nothing to me. I didn't know what day it was.

Q. Now, did Mr. Siebrand, or P. W. Siebrand ever ask you if you had anybody here that you knew, or that he could talk with, because of your condition? A. Well, yes.

Mr. Wilson: Just a moment. I object as leading and suggestive.

The Court: Yes, it is leading.

Q. (By Mr. Raineri): Well, did you have any other talk with him of any nature?

A. Well, he spoke about, when I was asking—I called that first night, the first afternoon, when I was able to phone, I phoned to Tucson. I called Mr. Clark first; Fred Clark was a friend of ours there, and I couldn't get him. He wasn't home. So I wanted to see somebody that I knew, some familiar face. [35]

Q. Who is Mr. Clark?

A. He was a friend of my husband's.

Q. Where does he live?

A. He lives in Fort Dodge also.

So I called the manager of the motel. He was the only familiar face I would know. This Mr. Bill Butler was the manager of this motel, and he came up to see me with another man who was in the motel at the time my husband was there, Mr. De Francisco from Chicago, a young fellow that was there. They came up to see me, but Mr. Clark didn't come until the next day.

(Testimony of Estella L. Gossnell.)

Q. The day following the accident.

A. The day following the accident.

Then is when I told him that Mr. Siebrand wanted to see him as soon as he came into town, so I told him that.

Q. Pardon me. Had Mr. Siebrand told you he wanted to see——

A. Yes. Mr. Siebrand told me that the day I was talking with him, because I had mentioned Mr. Clark and this other man who had come up to see me just out of friendship, and I told Mr. Clark when I called him, when I phoned him, that Mr. Siebrand wanted to see him. So he must have gone over to see him in Mesa, I think it was. [36]

Q. On any of these occasions that Mr. P. W. Siebrand came over to see you, was anybody else ever with him?

A. Yes, he brought Mr. Carroll.

Q. Who is Mr. Carroll?

A. Mr. Siebrand introduced him as the man who was driving the truck for him that day, and he brought him over to meet us.

Mr. Wilson: Just a moment. I object to the answer as not responsive, and I move it be stricken as prejudicial to this defendant.

I had no warning that the answer could possibly be that.

Mr. Gibbons: May we have the time and place fixed, your Honor, with reference to the defendant Carroll?

The Court: The answer may stand. Go ahead.

(Testimony of Estella L. Gossnell.)

Q. (By Mr. Raineri): All right, when was this, that is, that he brought over Mr. Carroll? Do you recall when that was?

A. It was some days following. It could have been two weeks. I really don't know.

But I do know they came over, and I met Mr. Carroll and Mr. Siebrand, and I didn't talk to Mr. Carroll at all. He just said, "How do you do?" [37]

I don't remember a word of conversation. Mr. Siebrand and I talked. He asked about my husband, and then—that was one of the other times.

Q. Now, what speed was your husband driving? I neglected to ask you that at the time.

A. We were just following in the line of traffic, and I think over that bridge it is around 25 miles an hour. We were just following along like you do in traffic.

Q. Now, do you have a record of bills that were paid in connection with the injuries your husband sustained? A. Yes, I do have.

Q. And the injuries you sustained?

A. Yes.

Q. Do you have those bills here in the courtroom? A. Yes, I do.

Mr. Raineri: Mark this Plaintiffs' Exhibit 1 for identification.

(Said document was marked Plaintiffs' Exhibit 1 for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs'

(Testimony of Estella L. Gossnell.)

Exhibit 1, so marked for identification, and ask you what those are, if [38] you know?

A. These are the receipts of all of the bills that have been paid, except the doctor bills.

That bill is just pending now, but these are all the receipts, and the cancelled checks. The nurses, those are all nurses.

And these are the doctor bills from the hospital in Fort Dodge, and the hospital in Tempe, and the doctor bills in Tempe.

This is medicine. This is the ambulance plane.

Q. Now, have you examined these to your satisfaction? A. Yes.

Mr. Raineri: May these be marked as Plaintiffs' Exhibit 2 for identification?

(Said documents were marked as Plaintiffs' Exhibit 2 for identification.)

Mr. Raineri: We will offer these in evidence, your Honor.

The Court: Any objection?

Mr. Gibbons: If the Court please, I don't think the witness has identified them yet.

The Court: Have you any objection?

Mr. Gibbons: Yes, I do, on those grounds.

Mr. Raineri: I asked her if those were [39] the bills.

The Court: He asked her if they were the bills.

Mr. Raineri: She said they were. I will go into it in a little more detail.

(Testimony of Estella L. Gossnell.)

Mr. Gibbons: All right. I will withdraw the objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit number 1 in evidence.

(Said documents were received in evidence and marked Plaintiffs' Exhibit number 1.)

Q. (By Mr. Raineri): Now, I will ask you, Mrs. Gossnell, have you totaled up all these various bills? Have you added them up?

A. Yes, I have.

Q. Are you able to tell the Court and jury just what you spent for various items that appear in these bills?

A. Yes, sir.

Q. All right. Will you tell us as briefly and quickly as possible just what those sums are?

A. The nurses' bills were the largest, which is always the case. [40]

Nurses' bills were \$3,888.00.

Q. Will you speak a little louder?

A. The nurses' bills were \$3,888.00. That was for three special nurses, the first about four or five weeks. Then I let one nurse go, and I helped at night, because I was right next to him, and I was able to get up and make him comfortable at night.

Then we had two nurses when we went back to Fort Dodge. He had to have these two special nurses because he needed constant care to make him comfortable.

Then when he had his operation, he had to have

(Testimony of Estella L. Gossnell.)

the nurses, but we let the nurses go in the first couple weeks in July. And then he was on general care from then on.

Q. Do you have any other item now?

A. Then for Tempe. In Tempe, this is the nurses.

This is the hospital bill, and the doctor bill. This doctor bill is paid. Dr. Pohle's bill is paid. That was \$2,752.00.

And the Fort Dodge Hospital, St. Joseph's Mercy Hospital in Fort Dodge is \$2,900.00.

Then we built a ramp from the front door down the steps; he couldn't walk down those [41] steps with his crutches, it was dangerous. So we built a ramp. That was \$66.00.

Then the amount of medicine we had at home and during those months was \$85.00 for the medicine.

Doctor Knowles' bill, which is not paid, the two doctor bills are not paid; Doctor Knowles, \$960.00. He is the surgeon.

Q. Nine hundred sixty dollars? A. Yes.

Q. All right.

A. And Doctor Dawson, he is the M.D., his is \$350.00.

Q. Three hundred fifty dollars?

A. Three hundred fifty dollars.

Q. All right.

A. And the ambulance, we had an ambulance from the airport, and back and forth home. The ambulance, there is one here that is \$9.00. Then

(Testimony of Estella L. Gossnell.)

there is ambulance back and forth home, that must have been that time, that was \$33.00.

Doctor Hartman's bill here in Phoenix was \$75.00.

And then the ambulance plane we took home was \$909.00.

Q. Does that complete all the bills? [42]

A. That is what I have here, yes, sir. There are many other incidentals, but I didn't put them down.

Q. Now, Mrs. Gossnell, you testified that you spent considerable time with your husband while he was hospitalized? A. Yes.

Q. On those occasions did you ever notice whether he was in observable pain or not?

A. In Tempe, yes, definitely.

Q. What about back in Fort Dodge?

A. In Fort Dodge—you see, in Tempe, I was right at the hospital, I was right with him day and night for nine weeks. I didn't leave the hospital grounds, only maybe the last two or three weeks they made me walk to town and back to get a little exercise.

But I was with him practically all the time, so I could observe him.

But in Fort Dodge, he had his two special nurses, and I went out every afternoon and every evening, and I was there a few times when they were getting him into the wheelchair, which was very painful.

It took the orderly and two, and sometimes three nurses to handle him, to get him in [43] that wheelchair, so he wouldn't have too much pain.

(Testimony of Estella L. Gossnell.)

He suffered very much.

Q. Mrs. Gossnell, when Mr. Siebrand was over to see you on those several occasions, did he at any time ever leave a card with you?

A. Yes, he left me his card the first time he was over.

Q. I show you Plaintiffs' Exhibit Number 2 so marked for identification, and ask you if that is the card that he left with you? A. Yes, it is.

Q. Is that right? A. Yes, that is right.

Mr. Raineri: We will offer this in evidence, your Honor.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 2 in evidence.

(Said document was received in evidence and marked Plaintiffs' Exhibit 2.)

Mr. Raineri: Your witness.

Cross-Examination

By Mr. Wilson:

Q. Mrs. Gossnell, you have cancelled checks for these items, do you? [44] A. Yes, sir.

Q. Now, how long has this cast been on Mr. Gossnell?

A. The one he has on now has been on since the 27th of October.

Q. What year? A. 1953.

Q. Has he been examined since then?

A. He had an X-ray just before we left.

Q. When would that be?

(Testimony of Estella L. Gossnell.)

A. That was, let's see, we got here, it was the 20th—now, I don't know. That was about just three or four days before we left Fort Dodge, and we left Fort Dodge the 25th of February. That was the last X-rays that were taken there.

Then when we got here, Dr. Hartman took one immediately. That would be the Monday following, we got here on Friday, that would be the Monday following. I don't know what date that would be.

Q. Did you see Dr. Hartman take that X-ray?

A. No, sir, I didn't.

Q. How do you know he took it?

A. His technician would take it.

Q. How do you know that he took it?

A. Well, I don't know. I would take Dr. [45] Hartman's word for it. He is a reputable surgeon.

Q. Then you are saying to us that he told you he took it, is that correct?

A. No. He didn't take it. The technician did.

Q. You are saying to us that he told you he took it?

A. No, sir. No, I say I would take his word for it if he said that that was the X-ray, I would take his word that it was.

Q. Did he say that he took it? A. No, sir.

Q. How do you know that he took an X-ray immediately upon your arrival here?

A. Well, I shouldn't have said that he took it, because he doesn't take X-rays. The technician at the Grunow Memorial Clinic took the X-ray.

Q. You heard Dr. Hartman testify in this mat-

(Testimony of Estella L. Gossnell.)

ter previously, where he stated that he had not examined the man since he had returned to Phoenix, because he was in a cast? Did you not hear that testimony?

A. I didn't understand that, sir.

Q. Did you hear Dr. Hartman testify in this matter previously that he had not examined Mr. Gossnell since he had been back in Phoenix, [46] because he had a cast on?

A. Well, that is a complicated question, he examined him.

Mr. Raineri: May it please the Court, that is a mis-statement of the testimony.

The Court: I don't remember. He started out by asking whether there had been an X-ray taken.

Mr. Raineri: The doctor testified he took an X-ray here, Dr. Hartman.

The Witness: He examined him otherwise, too.

Mr. Wilson: Just a moment, now, your Honor. I am examining the witness, not counsel. If you want to argue the case at the present time, I am afraid——

Mr. Raineri: No, but I don't think the evidence should be mis-stated. That is the only point I make.

Mr. Wilson: May I examine the witness, your Honor?

The Court: If you do it properly, you may.

Q. (By Mr. Wilson): Mrs. Gossnell, did you hear Dr. Hartman state from this stand when he was here previously, after you had returned to Phoenix in February, that as far as he knew, of

(Testimony of Estella L. Gossnell.)

his own knowledge, Mr. Gossnell [47] might have been well at that time, because he had the cast on, and he could not examine him?

A. I don't remember of him saying those words.

Q. Did you hear him say anything to that effect?

A. Well, he would have no way of knowing whether his leg was all right.

Q. Pardon me. Don't reason the matter out. Just state——

The Court: She might not even have been in the courtroom when he said that. If you have the record on that, you might read it.

Q. (By Mr. Wilson): Mrs. Gossnell, did you see the deposition of Mr. Clark that was taken recently in Fort Dodge? A. No, sir.

Q. Were you told of its contents?

A. No, sir.

Q. Did you know the deposition of Mr. Clark was recently taken in Fort Dodge?

A. I knew it was to be.

Q. I believe you stated that Mr. Siebrand came to see you, and that he asked how you were, and how Mr. Gossnell was? A. Yes.

Q. And if you had any money? [48]

A. Yes. Well, no, he didn't say, do we have any money. He said, "Do you need money?"

Q. And he asked you if you needed any help, or anything of that sort, or something to that effect?

A. Just if there was anything to make us more comfortable, just like everyone else did.

Q. And then on another occasion, as you stated,

(Testimony of Estella L. Gossnell.)

it might have been two weeks later, he came to the hospital with Mr. Carroll? A. Yes.

Q. Would you answer audibly?

A. Yes, sir, he did. He came with Mr. Carroll.

Q. Was anyone else present when Mr. Carroll was there?

A. I don't remember. They were all strange faces. There were a lot of people in that reception room at that hospital, and there may have been others. They could have been either visitors or patients. There were people in there, but I talked to Mr. Siebrand, and Mr. Carroll was there, and there could have been other people there, but whether or not they were with him I wouldn't know. I don't think so.

Q. Do you recall talking to Dorothy Dalton?

A. Yes, sir. [49]

Q. And you know my secretary, Dorothy Dalton? A. Yes.

Q. And her sister lives across the street from you in Fort Dodge? A. That is right.

Q. A while ago your counsel asked you if Mr. Siebrand came there with Mr. Carroll, and then you reiterated some conversation that Mr. Siebrand made with you while he was there.

Would you tell us again what that was?

A. Mr. Siebrand introduced me to Mr. Carroll and said, "This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you."

Q. Did he say anything else?

(Testimony of Estella L. Gossnell.)

A. And I spoke to the man just briefly.

Oh, then I didn't talk to Mr. Carroll, and Mr. Carroll asked about my husband, and I don't remember the conversation. I just don't remember all of it.

Q. It was just general?

A. Just like most people asked.

Q. Now, I will ask you, Mrs. Gossnell, if it was not a fact that Mr. Siebrand said to you that this is Mr. Carroll who was driving the truck?

A. No, sir. No. [50]

Q. And that he did not say "Driving the truck for us"?

A. He said, "This man was driving the truck for us that day."

Q. Mr. Siebrand said that to you? A. Yes.

Mr. Raineri: What is your answer?

The Witness: I said "Yes."

Mr. Raineri: She is taking it down, so you will have to answer yes.

The Witness: Oh.

Q. (By Mr. Wilson): What did Dorothy Dalton say to you that day?

A. She told me, she said, "I am Mr. Siebrand's lawyer's secretary."

And she said, "When I learned that you lived—I knew that you lived across the street from my sister, and they brought me over to see you."

And then we stood there and visited. Mr. Siebrand sat down on the davenport behind us.

(Testimony of Estella L. Gossnell.)

Q. I want you to tell us what you and Miss Dalton said to each other.

A. She told me who she was, and we talked about Fort Dodge mostly. There was nothing said. She asked how my husband was, and we talked about Fort Dodge, and not for very long, but it was not anything [51] about anything but generalities.

Q. Did she make you any offer of settlement?

A. Did Miss Dalton?

Q. Yes. A. No, sir.

Q. Was I there?

A. I never had seen you until recently.

Q. Until in this courtroom?

A. That is right.

Q. Did Mr. Siebrand say anything else other than that it was Mr. Carroll who was driving the truck for us? Did he say anything else?

A. Just asked about my husband, and how we were getting along. I don't remember anything else that was said except——

Q. Now, with regard to the time that Mr. Siebrand talked to Mr. Carroll, was this before or after he talked to Mr. Carroll, do you know?

A. You mean when he was with Mr. Carroll?

Q. Yes.

A. I talked to Mr. Siebrand, like I say, either the first or second day, and told Mr. Clark when I phoned him——

Q. What I am talking about now, this time when Mr. Siebrand was there and introduced Mr. Carroll as the man who was driving the truck for him? [52]

(Testimony of Estella L. Gossnell.)

A. Yes.

Q. Had Mr. Clark already talked to Mr. Siebrand like you had said he would do? A. Yes.

Q. Before that Mr. Clark had talked to Mr. Siebrand? A. Yes, sir.

Q. Now, as a matter of fact, Mrs. Gossnell, you know perfectly well that Mr. Siebrand came to see you out of a human motive, and nothing else on earth, do you not, and that he never made any such statement to you as that Mr. Carroll was driving the truck for him?

You know that to be a fact, don't you?

A. I don't understand that question.

Q. I say, you know Mr. Siebrand came to see you out of purely a human interest, to see that you weren't lying in the street, with no funds, and that he did not come there and tell you Mr. Carroll was driving the truck for him?

A. The first time Mr. Siebrand came——

Q. We are talking about the time he came with Mr. Carroll.

A. I don't remember whether he said——

Q. What about the first time? What did he say the first time? [53]

A. The first time Mr. Siebrand came?

Q. What day was that?

A. That was either the first day, the same day, or the next day.

Q. He came to the hospital?

A. Came to the hospital, yes.

Q. And you were pretty sick, were you?

(Testimony of Estella L. Gossnell.)

A. Well, they came and got me out of my room.

Q. And you walked into the reception room and talked to Mr. Siebrand?

A. I talked to him in the corridor that first time.

Q. In the corridor of the hospital?

A. As you go into the reception room, he was probably coming into the room, but my husband couldn't have any visitors, so they didn't get that far.

Q. Was he by himself?

A. That time he was by himself, so far as I know.

Q. And you talked to him? A. Yes.

Q. And what did you say to him, and what did he say to you?

A. That is the day that he asked about my husband, and wanted to know if we had a good [54] doctor, and if my husband was in good health.

And I told him all about that. And he asked me if we needed money. Then is when he said, he asked me if I could drive a car. And I said yes, I could drive.

He says, "I will buy you a car, and you can drive your husband home."

Q. That is the first time, he said that?

A. That is the first time that I saw him, I believe.

Q. Did he say anything else?

A. Oh, we stood there and visited.

Q. I know, but I mean anything that has got to

(Testimony of Estella L. Gossnell.)

do with this lawsuit. Did he say anything else? Did he say he liked you?

A. Oh, no. I told him about knowing these people in Tucson, that Mr. Clark was coming up to see us, that I was not able to do anything for myself, I didn't know anybody. And Mr. Clark had offered, if we needed anything or wanted anything, he would come up and do it. And he said if Mr. Clark——

Q. Why didn't you testify before as you testified today, that the first time Mr. Siebrand saw you, he offered to buy you a car?

A. You didn't ask me. [55]

Q. You didn't so testify, did you?

A. No, I don't think so.

Q. You don't recall my asking you, you don't recall them asking you?

A. You didn't ask me that. You didn't ask me if he offered me money. You asked me if Miss Dalton offered me money.

Q. I am talking about the first day when Mr. Siebrand came to see you, and you talked to him by yourself, and he was by himself, in the corridor?

A. Yes.

Q. You didn't testify before that he said he would buy you a new car?

A. No, because you didn't ask me that.

Q. But you do remember that he said that?

A. Yes.

Q. Did he say anything else? I am talking about did he say anything else about doing something for you?

(Testimony of Estella L. Gossnell.)

A. Well, when he spoke about if I needed money, I said not at the moment, I don't need any money. But I said I could get money if I needed it.

Q. Now, when Mr. Clark returned from talking to Mr. Siebrand in Mesa, where you had sent him just prior to the time Miss Dalton and Mr. Siebrand and Mr. Carroll went down to Tempe to see you [56] the second or third time, the first time they went down all together, did Mr. Clark tell you of the conversation he had with Mr. Siebrand?

A. No, I didn't talk to Mr. Clark.

Q. You didn't talk to him?

A. Well, he was there. He came in several times the first two or three weeks.

Q. I am talking about when he came back from talking to Mr. Siebrand in Mesa.

A. I don't remember him coming in. I may not have been in the room. I may not have been there. I don't know.

Q. When he came back from talking to Mr. Siebrand in Mesa, did he tell you what Mr. Siebrand said?

A. Not that I remember a thing about that, no, sir.

Q. To refresh your memory, I will ask you if Mr. Clark—now, let's see, Mr. Clark is a friend of yours, isn't he? A. Yes.

Q. And he lives in Fort Dodge? A. Yes.

Q. And he runs a packing house there, except he is retired? A. Yes. [57]

(Testimony of Estella L. Gossnell.)

Q. And he was in Tucson the night before you had the accident? A. Yes.

Q. He came up from Tucson, and you told him to go up and see Mr. Siebrand? A. Yes.

Q. And Mr. Siebrand was in the show at Mesa?

A. Yes.

Q. And he went a little less than two weeks after the accident? A. Yes.

Q. I will ask you if Mr. Clark said to you when he returned from seeing Mr. Siebrand that he had said to Mr. Siebrand:

“I understand you wish to see me.”

And that Mr. Siebrand had said to him, “I do.” And that he said, “And I am so sorry about this accident.”

And that he told Mr. Siebrand that Mrs. Gossnell had said that Mr. Siebrand wanted to see him. And that Mr. Siebrand said he was so very sorry about the accident, and that he was going to stand all damages, and would buy them a new car at once, because theirs was wrecked beyond repair.

Didn't he tell you that when he came [58] back from Mesa?

A. I think he told my husband.

Q. I don't care about that. Did he tell you?

A. I don't remember whether he told me or not.

Q. When was your husband able to have visitors?

A. There were times even during that first week when he wanted to see a close friend. No one, except somebody he knew very well was permitted to see him.

(Testimony of Estella L. Gossnell.)

Q. You said he was too ill to see Mr. Carroll, Mr. Siebrand, and Miss Dalton after Mr. Clark had returned from Mesa?

A. Yes. There were people from Phoenix and Tucson came over to see us, but they would not allow them to see him, except probably Mr. Clark and this man from the motel.

Q. I will ask you if Mr. Clark told you when he returned from seeing Mr. Siebrand at Mesa that Mr. Siebrand was going to put this in writing?

A. I never heard that.

Q. And I will ask you further if Mr. Clark told you when he returned from talking to Mr. Siebrand in Mesa, at your request, that he didn't want to get any lawyers into this matter, as they would drag the case through the courts for several years, and that he would pay all damages, and buy [59] you a new car?

A. I have no recollection of it put that way. I was not even interested in lawsuits. I didn't think about it. My mind was occupied elsewhere, and Mr. Clark, I left him, he just did whatever he wanted to do. I have no head for business, and if they were going at it that way, I didn't know anything about it.

Mr. Wilson: That is all, Mrs. Gossnell.

Mr. Gibbons: I have a few questions.

Q. (By Mr. Gibbons): Mrs. Gossnell, did you see the vehicle driven by Mr. Carroll before this collision occurred?

A. No.

Q. You didn't see it at all?

(Testimony of Estella L. Gossnell.)

A. No. I saw the trailer just from a short distance before it hit us.

Q. That is the first thing that came to your attention, then, was when the trailer was——

A. It was just——

Q. ——headed in your direction?

A. Headed our way. And I realized it was loose, that it was a loose trailer; I had time enough just for that.

Q. But you didn't see anything before that?

A. No, I didn't see the truck or trailer. [60]

Q. Did Mr. Carroll make any statements to you at the time you referred to in your testimony, when he was at the hospital where you were?

A. I don't remember him saying a word. I don't believe he did. I talked with Mr. Siebrand.

No, sir, I don't remember having any conversation with Mr. Carroll.

Q. Isn't it a fact that he told you there at that time that the hitch had broken, and he was sorry it had happened?

A. I don't remember that.

Q. Now, what treatment did you receive, Mrs. Gossnell, for the bruised or broken ribs that you referred to?

A. I just had an Ace bandage wrapped around me.

Q. That is the only treatment you received for that?

A. No. I had these hot steam packs on my chest and on my back, and that was all the treatment I received, except my—I had a couple of kinds of

(Testimony of Estella L. Gossnell.)

medicine, and had an injured arm that gave me more trouble than that, but it required no treatment, just had to get well by itself.

Q. You had no treatment for the arm at all, is that right? [61] A. No.

Q. Or for any of these bruises you referred to? There was no treatment for those also?

A. No, no. Just for my chest. The steam packs, I had those for many, many days, and this Ace bandage I wore, I wore that for several weeks.

Q. And did you receive any medical attention in connection with these bruised ribs after you returned to Fort Dodge?

A. I was going to say, in Tempe I did have a cut under my chin here, and when we entered the hospital, this doctor, not Dr. Pohle but another one in there sewed this up. That was the only other one. That doesn't show.

And then when I got back to Fort Dodge, no, I just had to take care of myself, and get myself back on my feet.

Q. You didn't have any further medical attention?

A. I had an X-ray, a chest X-ray, because I was still having pains in my chest.

Q. Mrs. Gossnell, do you know of any careless or reckless thing that you saw, yourself, that Mr. Carroll did?

Mr. Raineri: I will object to that, your Honor. I don't think she is——

(Testimony of Estella L. Gossnell.)

The Court: She didn't see it. She couldn't [62] say.

Mr. Gibbons: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Raineri: Your Honor, I forgot to offer here the damage to the car. We have got an exhibit here.

Mr. Wilson: We can stipulate to that, can't we.

Mr. Raineri: Yes. It is \$1,474.00. We will offer the bill in evidence.

The Court: All right.

Mr. Raineri: That is Plaintiff's Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(Said document was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Raineri: I will call P. W. Siebrand as an adverse witness.

P. W. SIEBRAND

called by the plaintiffs as an adverse witness, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Raineri:

Q. Your name is P. W. Siebrand? [63]

A. Yes, sir.

Q. And you are one of the defendants in this case?

A. Yes, sir.

(Testimony of P. W. Siebrand.)

Q. And you and your brother, Hiko Siebrand, are co-partners that run a circus and carnival known as Siebrand Brothers Circus and Carnival, is that right? A. Yes, sir.

Q. You have heard the testimony that has been given here so far regarding a truck pulling a trailer?

A. Yes.

Q. Was that truck that was pulling the trailer owned by you? A. Yes, sir.

Q. It was owned by you and your brother, is that right? A. Yes, sir.

Q. And this trailer was owned by a William Siebrand, is that right? A. That is right.

Q. And William Siebrand is a nephew of yours?

A. That is right.

Q. Now, William Siebrand, what connection did he have with your circus and carnival? [64]

A. He was a concessionnaire.

Q. He had a concession? A. Yes.

Q. Now, outside of concessions, you had rides and other equipment in your circus and carnival, is that right? A. Yes.

Q. And who owned the rides? A. We do.

Q. That is, you and your brother?

A. Yes, sir.

Q. William Siebrand had nothing to do with the ride part of the carnival? A. No.

Q. You and your brother had exclusive ownership? A. Yes, sir.

Q. And control of the rides, is that right?

A. Yes, sir.

(Testimony of P. W. Siebrand.)

Q. And any money that was derived from any ride equipment went solely to you and your brother, is that right? A. That is right.

Q. And William Siebrand had no connection whatsoever with that? A. No, sir. [65]

Mr. Raineri: That is all.

Mr. Wilson: No questions.

(Witness excused.)

Mr. Raineri: Your Honor, we have a deposition here that we took of Mr. Clark in Fort Dodge, Iowa, and we would like to offer that and to read it into evidence.

The Court: All right.

(Whereupon, the deposition of Mr. Fred J. Clark was read into the record.) [66]

The Court: We will have our afternoon recess at this time.

(A recess was had.)

The Court: You may proceed.

Mr. Raineri: May the deposition be marked as Plaintiffs' Exhibit 4 in evidence?

Mr. Gibbons: If the Court please, I would like at this time to move to strike the testimony of the previous witness, Fred Clark, as to the defendant, S. J. Carroll, since it purports to be a conversation which occurred several days after the accident, and not in his presence. It doesn't even purport, your Honor, to bind him in any way whatsoever.

The Court: I will consider that. Go ahead.

Mr. Raineri: We will offer the deposition. It is marked Plaintiffs' Exhibit 4, and we will offer that in evidence.

Mr. Wilson: If the Court please, may I object on behalf of Hiko Siebrand, on the grounds stated by Mr. Gibbons, on the ground it is not binding, a conversation occurring after the occurrence, and not in his presence?

The Court: All right.

Mr. Raineri: Is that received?

The Court: It is already in the record. I [67] don't know what you want that for.

It may be received.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(Said deposition was received in evidence and marked as Plaintiffs' Exhibit 4.) [68]

PLAINTIFFS' EXHIBIT No. 4

In the District Court of the United States for the
District of Arizona

Civil Action No. 1875 PHX

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiff,

vs.

P. W. SIEBRAND, HIKO SIEBRAND d.b.a.
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

April 5, 1954

Appearances:

MR. B. B. BURNQUIST,

Of Fort Dodge, Iowa,

Appeared for the Plaintiffs.

MR. MAURICE J. BREEN,

Of Fort Dodge, Iowa,

Appeared for the Defendants.

Deposition of Fred Clark, a witness of lawful age, taken on behalf of the plaintiffs in the above-entitled cause, wherein George F. Gossnell and Estella Gosnell, his wife, are the plaintiffs, and P. W. Siebrand, Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, and S. J. Carroll, are defendants, pending in the District Court of the United States for the District of Arizona, pursuant to the notice hereto attached, before Wilma F.

Plaintiff's Exhibit No. 4—(Continued)

Devlin, a certified shorthand reporter in and for the Eleventh Judicial District of Iowa, at Fort Dodge, Iowa, on the 5th day of April, 1954.

* * *

Mr. Burnquist: This deposition is taken under notice of taking deposition. Notice was served on Francis W. Wilson, Phoenix National Bank Building, Phoenix, Arizona, and Howard W. Gibbons, First National Bank Building, Phoenix, Arizona, attorneys for defendant, on the 26th day of March, 1954, by mailing said notice to them.

It is further understood that Maurice J. Breen is appearing on behalf of defendants at the taking of the deposition.

It is agreed that oath may be administered by Wilma F. Devlin, an official court reporter of the Eleventh Judicial District of Iowa, who, under the laws of Iowa has the same authority to administer oaths as a notary public, and the fact that she is not a notary public is waived and her competency is not questioned.

It is further agreed that the testimony of Fred Clark may be taken before her and that she shall take down the questions and answers in shorthand and transcribe the same, and upon such transcription forward a true transcript of said testimony to the Clerk of the United States District Court of the District of Arizona, at Phoenix, Arizona, and that her certificate as to the accuracy of the said transcription shall be accepted by all parties hereto.

Plaintiff's Exhibit No. 4—(Continued)

FRED CLARK

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Burnquist:

Q. Your name is Fred Clark?

A. Fred J. Clark.

Q. The name is Fred in the notice. You were the Fred Clark, you assume, who is named in the notice to take this deposition? A. Yes.

Q. How old a gentleman are you, Mr. Clark?

A. I am sixty.

Q. For a number of years you have been connected with the Tobin Packing Company at Rochester, New York, and Fort Dodge, Iowa?

A. Yes.

Q. How long were you connected with them?

A. Indirectly or directly thirty-nine years.

Q. You retired three or four months ago?

A. July of last year.

Q. At the time of your retirement what position did you occupy with Tobin Packing Company of Fort Dodge?

A. I was vice-president of the company and director and manager of this plant.

Q. Of the Fort Dodge Division? A. Yes.

Q. Mr. Clark, are you acquainted with George F. Gossnell and Estella Gossnell, the plaintiffs in this case? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Q. How long have you known them?

A. About fifteen years.

Q. You are not in any wise related to them or connected with them in business in any way?

A. No.

Q. And never have been? A. No.

Q. Your acquaintance has been casual or as any other citizen of Fort Dodge? A. Yes.

Q. Mr. Clark, were you in the State of Arizona in February, 1953? A. Yes.

Q. Where were you staying along about the latter part of February? A. Tucson.

Q. Did you see the plaintiffs, Mr. and Mrs. Gossnell, while you were down there?

A. Yes, many times.

Q. Do you recall the occurrence along in the twenties of February, of Mr. and Mrs. Gossnell having a collision with their automobile and a trailer truck or trailer? A. Yes.

Q. What date do you think that was?

A. It was on a Friday, about the 20th of February.

Mr. Breen: What year?

The Witness: 1953.

Q. (By Mr. Burnquist): Had you seen the Gossnells prior to that time?

A. The last time I saw them was the evening previous.

Q. The evening before the accident?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

A. Yes.

Q. You were both in the same town?

A. Yes.

Q. And you left them in the evening. Had you dined together or——

A. We dined at the Elks Club the night before the accident.

Q. You heard about the accident from some source?

A. My wife had advised me at about five o'clock.

Mr. Burnquist: I don't care, Mr. Clark, as to any hearsay testimony, but you heard about the accident shortly after it occurred? A. Yes.

Q. Did you go to see Gossnells after you heard about the accident?

A. Yes, the next morning, on Saturday morning.

Q. Where were they?

A. In the hospital at Tempe, Arizona.

Q. In general what was their condition?

A. They were both in a state of shock, Mr. Gosnell much worse than Mrs. Gosnell.

Q. After seeing them did you meet the defendant, P. W. Siebrand? A. I did.

Q. Where did you meet him and when?

A. I met him at the circus grounds at Mesa, Arizona, about eight miles from Tempe, the afternoon of Saturday following the accident.

Q. That is the day after the accident?

A. Right.

Q. Where was he when you met him?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

A. He was in a trailer that he used for an office, which was on the grounds at Mesa.

Q. Was there a fair going on there?

A. There was a fair, I think.

Q. At Phoenix? A. At Mesa.

Q. At Mesa?

A. With much of Siebrand's equipment and several trailers there along with other amusements.

Q. Did you announce yourself to Mr. Siebrand when you went into the trailer?

A. Yes, introduced myself and said——

Q. Wait a minute, was there anybody with you?

A. Yes.

Q. Who?

A. P. J. Collins of Fort Dodge, Iowa.

Q. What was your first statement, if any, and Mr. Siebrand's reply when you went into the trailer?

Mr. Breen: Just a minute. If this interrogatory calls for a statement or remarks made by P. W. Siebrand, the same are objected to by the defendants as incompetent and immaterial, and for the specific reason that they are hearsay and made apparently twenty-four hours or more after the alleged accident, and not at the scene of the accident, not part of the accident or the situation surrounding the accident.

The further objection is made that any statements or admissions made by P. W. Siebrand could in no way be binding on Hiko Siebrand or upon S. J. Carroll.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

Q. (By Mr. Burnquist): I asked you what you said and what he said. What did you say to Mr. Siebrand?

The Witness: I introduced myself and after commenting on the weather and the large circus which they had——

Mr. Burnquist: Yes, but——

The Witness (Continuing): ——I said, "I understand you wish to see me."

He said, "I do, and I am so sorry about this accident."

Q. Did you tell him who told you he wanted to see you?

A. I told him Mrs. Gossnell said that he wanted to see me.

Q. What was his reply to that?

Mr. Breen: Same objection as last urged.

Mr. Burnquist: Go ahead.

The Witness: He said that he was so very sorry about the accident and he was going to stand all damages and would buy them a new car at once because theirs was wrecked beyond repair.

Q. What else, if anything, did he say?

Mr. Breen: Same objection as last urged.

The further objection is made, or motion to strike the last preceding answer in that the remarks could in no way be construed as an admission of wrong doing on the part of the defendants or any of them and could in no wise be construed as showing that the defendants or any of them, or anyone acting

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

for them, had been guilty of any wrong doing, misconduct or negligence, either affirmative or non-affirmative.

Mr. Burnquist: Go on, tell the rest of the conversation about what he would do or what he said about the accident.

Mr. Breen: Same objection.

The Witness: We talked about the circus display and he said it was just a winter showing of their show and that they did not start on the summer tour until later in the winter or early spring.

Q. (By Mr. Burnquist): Did he state a fact where he said anything about whether they were moving their equipment or otherwise?

Mr. Breen: Same objection as last urged.

The Witness: He said that this was an early showing of their circus to that extent and he was quite interested that Gossnells had good medical attention.

Q. (By Mr. Burnquist): What did he say about it?

A. He further stated that lawyers shouldn't be brought into the case as they could settle between the Gossnells and himself, as he would stand all damages and lawyers would drag the case through the courts for several years.

Mr. Breen: Move to strike the last answer for all the reasons heretofore urged.

O. (By Mr. Burnquist): What, if anything.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

did he say about the movements of their equipment at the time, as to the distance they were moving it, or whatever?

Mr. Breen: Same objection as last urged.

The Witness: He talked about the equipment being at the Mesa Fair Grounds, was moving it from Phoenix, which is only fifteen miles away.

Q. Mr. Clark, why did you go to see him?

Mr. Breen: Objected to as calling for the opinion and conclusion of the witness; not binding on any of the defendants.

The Witness: At Mrs. Gossnell's request, that Mr. Siebrand told her he wished to see me, inasmuch as I was a friend of theirs.

Q. (By Mr. Burnquist): Did you go for any purpose except to find out about the accident?

A. I went to see him at his request.

Q. Because he asked for it?

A. That is right.

Q. You had sought no interview with him?

A. No.

Q. When you told him Mrs. Gossnell said he wanted you to see him, what did he say?

Mr. Breen: Objected to as leading and suggestive, and the same objection as urged to this line of testimony about attempting to get in an admission as against these other defendants.

The Witness: He repeated several times about how sorry he was about the accident had to happen to the Gossnells with his equipment and that he

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

would stand all damages, and as I said before, buy them a new car at once, assuming that, I suppose—that Mrs. Gossnell could drive.

Mr. Burnquist: I think that is all.

Cross-Examination

By Mr. Breen:

Q. Fred, Fort Dodge is a town of approximately 25,000? A. Yes.

Q. You and Gossnells have both lived here for a good many years?

A. We have lived here going on fifteen years.

Q. And the Gossnells have, as far as you know, lived here always?

A. They were here when we came.

Q. You belong to some of the same clubs?

A. The Country Club.

Q. You have frequently met the Gossnells in Fort Dodge? A. Very often.

Q. And played golf with them at the Country Club? A. A great many times.

Q. Fred, did you visit back and forth in the respective homes? A. Here?

Q. Yes. A. Very occasionally.

Q. Was there any concert between you going to Arizona, at least, with the Gossnells, or to meet them there, or anything of that kind? A. No.

Q. You were out there somewhat for your own health? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

Q. You had seen them and been with them more or less frequently before this accident?

A. We had played golf probably fifteen to twenty times and had dinner on several occasions.

Q. And Fred, were you staying at the same resort or hotel or whatever— A. No.

Q. Different ones? A. Yes.

Q. In what town? A. Tucson.

Q. Where did this accident take place?

A. At Tempe, on the bridge at Tempe.

Q. Tempe is right outside of what?

A. Phoenix, eight miles out of Phoenix.

Q. That was approximately how far from Tucson? A. I believe about 110 miles.

Q. Then you heard of this accident on a Friday night, the latter part of February, 1953?

A. Yes, the same day of the accident.

Q. You were at Tucson when you heard about it?

A. Yes.

Q. They were supposedly in the hospital at Tempe? A. That is right.

Q. So you had quite a drive the next day to see them? A. Yes, I did.

Q. This town where the carnival was, or at least part of it was, was what town, Fred?

A. It was Mesa, M-e-s-a, about eight miles from Tempe.

Q. You saw the Gossnells in the hospital at Tempe? A. Yes.

Q. Sometime Saturday? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Q. Saturday morning?

A. Saturday morning.

Q. Then you later Saturday afternoon saw Mr. P. W. Siebrand at the carnival grounds or show grounds, or whatever you call it, in Mesa?

A. That is right.

Q. You didn't see anybody else connected with the carnival, or at least talk to them?

A. No, I didn't except for directions to Mr. Siebrand.

Q. You don't know personally how this accident happened?

A. Only by hearsay.

Q. Did Mr. P. W. Siebrand say anything about the details of how the accident happened, any more than he was sorry and he would replace the car, and so on?

A. No, he didn't go into any details of the accident with me.

Q. You don't know from what he said whether he was driving the truck, or who was driving the carnival truck?

A. He said he was not driving.

Q. And how he was going to replace the car, or who was going to replace it, or what he was going to do about damages, or who was going to pay for them, he didn't say?

A. He said he would take care of the damages.

He said, "I will take care of all damages and will replace the car at once."

And if you wish me to say, he further said, "I

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

hope we don't get lawyers into the case because it will drag through the courts for several years."

He further said, "I hope they have good medical attention."

Q. Fred, that was the substance of everything that was said?

A. Except we visited about the size of the show, that it was quite large for a small circus.

Q. Did Mr. Collins take any part in the conversation?

A. I believe that he talked very little. He rode up with me.

Q. Mr. P. J. Collins is also a Fort Dodge man?

A. Yes, who was staying in Tucson also at the time.

Q. He is somebody you have known for some-time? A. Yes.

Q. The Gossnells have known for sometime?

A. Right.

Q. Aside from you and Mr. Collins and Mr. P. W. Siebrand, was there anybody else a party to the conversation?

A. No, nobody was in the trailer with us.

Mr. Breen: I think that is all.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Redirect Examination

By Mr. Burnquist:

Q. You went there because he requested you to go?

A. Yes, when I saw Mrs. Gossnell she said, "Mr. Siebrand wishes to see you."

Q. Did you go there as an emissary of the Gossnells, or what?

A. No, I didn't. He asked Mrs. Gossnell if they had any friends out that way and she said she had this good friend of theirs in Tucson, which was, of course, myself.

Q. You advised Mr. Siebrand of that fact when you introduced yourself?

A. Yes, I did, and I would like further to make the statement that I told Mr. Siebrand if he wished to stand all damages that he should write a letter to them saying so, which he said he would.

Q. He said he would write the Gossnells what he told you?

A. He would write them a letter saying he would stand all damages.

Mr. Breen: Move to strike it.

Mr. Burnquist: That is all.

Mr. Breen: Move to strike the last answer for all the reasons heretofore urged with reference to the inadmissibility of this testimony on the theory of it being an admission against interest, and for

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

the further reason that it would appear, at least from the testimony, that Mr. Clark was acting as the representative of the Gossnells, the plaintiffs, and was talking to P. W. Siebrand on their behalf.

That the last testimony offered by the witness pertains to an alleged settlement between the plaintiffs and the defendant, P. W. Siebrand alone, and was never carried out.

(Witness excused.)

Mr. Burnquist: We can agree he doesn't have to sign the notes?

Mr. Breen: That is right.

Mr. Burnquist: It is hereby stipulated and agreed that the signing of the shorthand notes or the signing of the transcript of the testimony be and the same is hereby waived, and that said deposition may be received with the same force and effect as though signed by the witness Fred Clark.

Mr. Breen: That is right.

Certificate

State of Iowa,
County of Webster—

I, Wilma F. Devlin, a certified shorthand reporter, in and for the Eleventh Judicial District of Iowa, of which Webster County is a part, do hereby certify that, pursuant to the notice hereto annexed, there came before me on the 5th day of April, 1954, at 11:45 o'clock a.m., at Suite 414, State Bank Build-

Plaintiff's Exhibit No. 4—(Continued)

ing, Fort Dodge, Iowa, the following named person, to wit: Fred Clark, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath, and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand this 5th day of April, 1954.

/s/ WILMA F. DEVLIN.

Admitted in evidence and Filed April 13, 1954.

Mr. Raineri: I call John Boyd.

JOHN D. BOYD

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Your name is? A. John D. Boyd.

Q. What is your employment, Mr. Boyd?

A. Patrolman, Police Department, City of Tempe.

Q. Are you a member of the police force over in Tempe? A. That is right.

Q. Were you a member of the police force on February 20th, 1953? A. Yes, sir.

Q. Directing your attention to the early morning of February 20th,—not early morning, but to the morning of February 20, 1953, at approximately ten a.m., o'clock, will you tell us where you were at that time?

A. Nine-fifty on the morning of February 20th?

Q. Around ten o'clock, yes.

A. Around ten o'clock in the morning I was going south on the Tempe bridge following a [69] trailer. A pick-up was pulling this trailer, and it was, oh, a two-wheel trailer, and it was rather heavy.

And when it went over the end of the bridge, there was a sort of a rise at the end of the bridge, about oh, seventy-five or one hundred feet beyond there, and it suddenly veered to the left.

(Testimony of John D. Boyd.)

Evidently it came loose from the pick-up, and ran into the side of this car.

Q. And you saw this all happen, is that right?

A. Saw it all happen.

Q. How far were you behind this—you were going in the same direction as the truck and trailer?

A. Same direction, right behind it.

Q. How far behind it were you?

A. About three car lengths.

Q. And there was nothing obstructing your view, or anything? A. Nothing.

Q. You were the first car immediately following that truck and trailer, is that right?

A. That is right.

Q. All right, now, how fast were you travelling at that time?

A. Approximately twenty, twenty-five miles [70] an hour.

Q. Did you observe a car or cars coming from the opposite direction? A. Yes, sir.

Q. Is that a four-lane highway there on that bridge? A. Yes, sir.

Q. Two lanes on each side of the black line?

A. That is right.

Q. What cars did you observe coming from the opposite direction?

A. Well, I observed, I believe it was three cars in line.

Q. Do you know what lane those three cars were in?

(Testimony of John D. Boyd.)

A. They were on the outside lane next to the curbing.

Q. They were, then, in the extreme right lane?

A. Extreme right lane.

Q. Of their right side, then, is that right?

A. That is right.

Q. Now, as you were watching all this, did you observe how far that trailer was from those cars, or any one of those cars, particularly if it hit any of them at the time of the impact, or just previous to the impact? [71]

A. How far it was from them?

Q. Maybe I didn't make myself clear.

How far were those cars, approximately, from that trailer when it began to veer to the left?

A. They were about half the length of the highway, over to the highway, I mean.

Q. What would you say in feet that was?

A. Oh, about twenty feet, fifteen, twenty feet.

Q. And which one of those three cars, if any, was struck? A. The one in the middle.

Q. The one in the center? A. Yes.

Q. Did you determine later whose car that was?

A. Yes, sir.

Q. And whose car was it?

A. Mr. Gossnell.

Q. George F. Gossnell? A. Yes.

Q. And you identified it later through the license? A. That is right.

Q. And inquiries there, is that right?

A. That is right. A complete investigation.

(Testimony of John D. Boyd.)

Q. Now, did you find out who was driving the truck that was pulling the trailer? [72]

A. Yes, sir.

Q. And who was driving that?

A. S. J. Carroll.

Q. Did you determine who owned the truck that he was driving? A. That is right.

Q. Who owned the truck he was driving?

A. Siebrand Brothers Circus and Carnival.

Q. Did you determine who owned the trailer that the truck was pulling?

A. I figured that was right along with the truck, and the pick-up, too.

Q. You didn't check on the exact ownership of the trailer? A. Not at the time, no.

Q. You took it for granted if you checked on the truck, whoever owned the truck owned the trailer, is that right? A. That is right.

Q. Now, did you have any talk there immediately following the accident with the driver of truck?

A. Yes, sir.

Q. Will you tell us generally all of the conversation that was had there relating to the matter, as best you can remember?

A. We generally ask, when we fill out our [72-A] accident report, we just ask them their name, for their driver's license, and where they live, and their occupation, and such as that.

Q. Now, when you asked him what his occupation was——

(Testimony of John D. Boyd.)

Mr. Wilson: I object. Excuse me. No foundation laid.

Mr. Raineri: I will withdraw the question.

Q. (By Mr. Raineri): Did you at that time in connection with the filling out this report, ask the driver of the truck who he was employed by?

Mr. Wilson: I object. The report is the best evidence.

The Court: He may answer.

Mr. Raineri: Will you read the question again?

Mr. Wilson: May I ask him on voir dire?

The Court: You may ask him.

Mr. Raineri: May it please the Court, may I make a statement?

The Court: Oh, no. If he wants to ask a question on voir dire.

Q. (By Mr. Wilson): Do you have the report?

A. What? [73]

Q. Do you have the report you made out at that time? A. No, I don't have the report.

Q. Where is it? A. It is at the station.

Q. You are testifying from your memory now?

A. That is right.

Mr. Wilson: That is all.

The Court: Read the last question that was put to the witness.

(The question was read as follows: "Q. Did you at that time in connection with filling out this report ask the driver of the truck who he was employed by?")

(Testimony of John D. Boyd.)

The Witness: Yes, sir.

Q. (By Mr. Raineri): And what was his answer to that?

A. Siebrand Brothers Circus and Carnival.

Q. Now, did you examine the trailer hitch that was attached to the truck that was pulling the trailer, and examine the hitch that was attached to the trailer itself?

A. In all accidents we do that, examine everything.

Q. And what did you find, or what did your [74] examination of that equipment reveal?

A. I found that there was no safety chain, and there was no lock for the ball hitch at all on the trailer.

Q. Did you observe whether any part of that hitch, either the part on the truck or the part on the trailer, was broken in any way?

A. No, there was not nothing broken. There had never been any lock on it at all.

Q. Now, in that connection, did you issue a citation, or give him a ticket for having unsafe equipment there?

A. Yes, I did.

Q. And did you cite the driver of the truck for that?

A. That is right.

Mr. Raineri: Your witness.

(Testimony of John D. Boyd.)

Cross-Examination

By Mr. Gibbons:

Q. Mr. Boyd, how long had you followed this truck and trailer?

A. Oh, maybe three or four minutes.

Q. Will you tell the jury about what speed it was proceeding at?

A. Twenty, twenty-five miles an hour. [75]

Q. Is that a lawful speed there at that place and time?

A. Yes, sir, it is.

Q. And was the truck and trailer on its proper side of the highway?

A. Yes, sir. It may have been hanging over a little bit on the line, as all drivers do when they cross the bridge. They have a tendency to kind of straddle the line there a little bit, because of fear of hitting the curbing.

Q. Now, there is also a sharp rise there on the bridge as you enter the bridge, isn't there?

A. It is not a sharp rise. Well, it kind of goes up like a little hill, you know.

Q. It amounts to a bump, doesn't it?

A. Not exactly.

Q. Isn't it a fact that is put there for speeders to slow them down as they enter the bridge?

A. Not necessarily.

Q. Just answer my question yes or no.

A. No.

Q. It does give you quite a jolt, though, if you are speeding, doesn't it?

(Testimony of John D. Boyd.)

A. I imagine if you were going fifty, sixty miles an hour, yes.

Q. But you didn't observe anything unusual at [76] all about the driving of this tractor or trailer until you said you saw the trailer come loose from the vehicle that was pulling it?

A. That is right.

Q. What did you do immediately after the trailer came loose and struck the car across from it?

A. Well, I noticed that the car was starting to catch on fire. I had run over and was trying to get the man out, and he was pinned in the car, so I immediately radioed for a fire truck and an ambulance, and then went back to help get the man out.

Q. How long did that take, Mr. Boyd?

A. Oh, a little over five minutes.

Q. And then what did you do after Mr. Gossnell was removed from the automobile?

A. Then we called for a wrecker and started with my investigation.

Q. And with what did you call for a wrecker? You had to return to the police car where you had a radio, is that right?

A. It was radioed in, yes, sir.

Q. Then when you started your investigation, what did you do?

A. Just asked the usual questions when you fill out a report, an accident report. [77]

Q. And that was the time you talked to Mr. Carroll here, is that right?

A. That is right.

Q. That is the first thing you did?

(Testimony of John D. Boyd.)

A. That is right.

Q. And while you were talking to him, you said you filled out a complete accident form, is that right?

A. Yes, sir.

Q. Then what was the next thing you did?

A. I issued a citation to Mr. Carroll.

Q. And what after that?

A. Well, I proceeded to finish my investigation on the paper, and then I went down to the hospital, that is, after all of the accident was cleared up.

Q. Mr. Boyd, didn't you just tell the jury a few minutes ago that you went back and looked at this trailer hitch?

A. Yes. After I went back——

Q. Please answer this question:

Did you do that before or after you talked to Mr. Carroll?

A. Looked at the trailer hitch before we talked to Mr. Carroll?

Q. Yes.

A. State your question again, will you, [78] please?

Q. Mr. Boyd, you have testified that the first thing you did was go over and help extract Mr. Gossnell from the automobile?

A. That is right.

Q. And that the second thing you did was to return to your police car and radio in a report for ambulance, and what else might have been required?

A. Yes, sir.

Q. And that the next thing you did was talk to Mr. Carroll, at which time you filled out an accident

(Testimony of John D. Boyd.)

report, is that right? A. That is right.

Q. Then you said the next thing you did was to give Mr. Carroll a citation, right?

A. That is right.

Q. And earlier in your testimony you said you went back at sometime or other and looked at the trailer hitch. I am just asking you when you did that?

A. That is right. That is why he was issued a citation.

Q. When did you go back and look at it?

A. While we was investigating the accident.

Q. Before or after you gave Mr. Carroll a citation? A. Before. [79]

Q. Before? A. That is right.

Q. You said there were no safety chains there, is that right? A. That is right.

Q. Can you state whether or not the law of this State requires safety chains on such a device?

A. Yes, sir, it does.

Q. Are you sure of that? A. Positive.

Q. Can you give me the statute that requires such safety chain? A. No, sir.

Mr. Mahoney: I object on the ground it is argumentative.

The Court: Yes.

Q. (By Mr. Gibbons): You are sure of that?

A. Positive.

Mr. Mahoney: The objection has been sustained.

The Witness: May I say one more thing?

The Court: No.

(Testimony of John D. Boyd.)

Q. (By Mr. Gibbons): Is that why you gave Mr. Carroll a citation, because there were no safety chains? [80] A. That is right.

Q. Now, will you describe this trailer hitch in more detail to the jury, Mr. Boyd? Do you remember it at all? A. The trailer hitch?

Q. Yes. A. Yes.

Q. Well, describe it briefly to the jury.

A. Well, it was a regular trailer hitch, for a trailer.

Q. Assuming that they know nothing about a trailer hitch, give them some idea what it looks like.

A. We took pictures of it.

Q. Do you have them with you?

A. They are submitted to the Court.

Q. It consisted of a steel ball on one vehicle?

A. That is right.

Q. And a clamp or catch on another?

A. It is supposed to be.

Q. And you said there was nothing broken on there at all? A. Not a thing.

Q. You have testified here before in this matter also, haven't you? A. That is right. [81]

Q. And didn't you previously testify that you went back and looked all over the bridge, and even back on the highway to find the piece that was missing, that was broken off?

A. That was just to check to see if anything had come off of the trailer.

Q. You did testify to that in the previous trial, didn't you? A. Yes, sir.

(Testimony of John D. Boyd.)

Q. As a matter of fact, didn't you say that the catch that should have held the ball had become broken and was off?

A. There was no indication of one being on it at all. That was my testimony.

Q. What was there to hold it, then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

A. There was supposed to be a chain and a lock on it, but there was nothing on it.

Q. At the time you saw it, there was nothing to hold it at all, was there?

A. That is right.

Mr. Gibbons: That is all.

Q. (By Mr. Wilson): You have your little highway code book with [82] you, and you look into it to see when a law has been violated?

A. No, sir.

Q. You have one, don't you?

A. No.

Q. You just guess at the law?

A. No, I see in our citation books. We have our code numbers.

Q. Have you got it with you?

A. No, sir.

Q. Where is it?

A. It is at the station where it belongs.

Q. Do you know the citation of the law that requires safety chains?

A. No, not offhand, no.

Q. You know perfectly well there is not such a thing, don't you?

(Testimony of John D. Boyd.)

Mr. Mahoney: I object on the ground it is argumentative.

The Court: Yes. Don't argue with him.

Q. (By Mr. Wilson): Now, would you make a picture of this trailer hitch, the part that is on the trailer, on the blackboard? Could you do that for us?

A. I will make a front view of it coming from the trailer. Say this is the trailer here, the [83] front of it. (The witness illustrates on blackboard.)

And this would be the tongue coming out here. And your brace is this way. It has got sort of a cup here that fits over the ball on the pick-up, and this sets right over the ball of the pick-up.

Is that clear enough, sir?

Q. Is that what this one looks like?

A. That is right.

Q. Now, then, show in a different drawing to the side the part that comes on the bottom and holds it on the ball. This is a standard hitch, isn't it?

A. You mean——

Q. The cup sets over the top of the ball. Then——

A. This sets down over the ball.

Q. What goes under it to hold it on there?

A. On top here is supposed to be a lock. It is unscrewed when it sets on the ball, and it closes up and sort of forms a bushing right on the ball on the pick-up.

Then you screw it down and tighten your lock. It is supposed to have a little thing that sets on top there that locks it. When you screw it down tight it will push it up snug. in the [84] ball.

(Testimony of John D. Boyd.)

Q. This hitch had no indication of having any such screw on it?

A. No indication whatsoever of having any lock on at all.

Q. Did you ever hear of one that has a clamp that comes on the bottom?

A. I have never seen one. This had the hole on top here where the thing is supposed to go down through to lock it.

Q. I thought you said it didn't have any indication there was supposed to be one?

Mr. Raineri: No, he didn't say that.

Q. (By Mr. Wilson): Did it have an indication that there was a screw missing out of the top?

A. No indication of the screw ever being in it.

Q. No threads, or anything?

A. No threads or nothing.

Q. Then what is your statement? That there was an indication there was one, that there was a screw on top?

A. That there was a screw on top?

Q. Yes.

A. On all trailer hitches there is a hole here that the thing goes down through. [85]

Q. Including this one?

A. Yes, including this one. There could have been, yes.

Q. There is a hole in this one?

A. It is the same type, yes. And that screws down and locks, and pulls it up onto the ball part of the pick-up.

(Testimony of John D. Boyd.)

Q. There are no trailer hitches with a clamp, a lever that comes from underneath?

A. I have never seen one.

Q. This one had a hole in the top of the ball where the screw came out, in your opinion?

A. That is right.

Q. You would regard it as not being broken? You said it was not broken?

A. I could find no indication of its being broken, no.

Q. It had come apart, in your opinion, I assume? A. I didn't say it came apart.

Q. What did you say about it?

A. I said that there was a place on top here where when that screw is down it comes down flush with that. You can see where there is some indication of it being a lock on it, but there was no indication on it at all. [86]

Q. It hadn't broken off? A. No.

Q. And it hadn't come apart? A. No.

Q. What had broken—or what had become of it?

A. I don't know.

Q. How do you suppose it could get off of there if it didn't break off or come apart?

A. Maybe there was never one on it.

Q. That is what you want to tell the jury?

A. No, not necessarily.

Q. What do you want to tell them?

A. I have tried to explain it to you here; you asked me for an explanation, and I am giving it to you.

(Testimony of John D. Boyd.)

Q. All right. Thank you. Sit down.

Do you recall my asking you before about this record? You do, don't you? A. About what?

Q. About this record you made at that time? Do you recall my asking you about it?

A. The accident report, you mean?

Q. Yes. A. Yes, sir.

Q. And you recall not having had it at that [87] time? A. That is right.

Q. And did you deliberately leave it home this time?

A. Yes, sir; our reports in the office are confidential, sir.

Q. They are confidential?

A. That is right.

Q. And you can testify from them glibly, but they are confidential? A. That is right.

Q. You are testifying from the report now, aren't you?

A. I am testifying just from my report, that is right.

Q. Now, you assumed that the trailer belonged to Mr. Siebrand.

Why didn't you assume that Mr. Carroll was the driver of the truck, and was therefore in the employ of Mr. Siebrand?

A. Why didn't I assume that?

Q. Yes. Why didn't you ask him?

A. We always do that.

Q. But you do always ask about the trailer, who they belong to?

(Testimony of John D. Boyd.)

A. We always ask who they belong to.

Q. You didn't in this case? [88] A. Sure.

Q. You asked him who the trailer belonged to?

A. I asked him who he was employed by.

Q. I asked you, did you ask him who the trailer belonged to? A. No, sir.

Q. You asked that in other cases? A. No.

Q. You never do that? A. No.

Q. You assumed that the trailer belonged to Siebrand? A. That is right.

Q. And you assumed that he was the employee of Siebrand?

A. No, I didn't assume it. He told me that.

Q. He told you that? A. That is right.

Q. Now, why would you ask him such a silly question when he was driving Siebrand's truck?

Mr. Raineri: I will object to the form of that question.

The Court: Yes.

Q. (By Mr. Wilson): Did you ask him if he stole the truck? A. If he stole it? [89]

Q. Yes. A. No.

Q. When you saw that he didn't have a chauffeur's license, which he didn't—that is true, isn't it?

A. That is right.

Q. Did you think he stole the truck?

A. No.

Q. Why not?

A. Well, it just didn't enter my mind, that is all.

Q. Aren't truck drivers supposed to have a chauffeur's license? A. Generally, yes.

(Testimony of John D. Boyd.)

Q. Why didn't you give him a citation for that?

A. If I remember right, I believe he told me he had one, but he didn't have it on his person at that time.

Q. You have got to have them on your person, or you are breaking the law?

A. That is right.

Q. So you gave him the citation for not having the safety chains, but you didn't give him a citation for not having a chauffeur's license?

A. No. I gave him a citation for the unsafe equipment. [90]

Q. You said the safety chains. Do you want to change it? A. Change what?

Q. I wrote it down, that you said the reason you gave him a citation was because he didn't have safety chains.

A. He had unsafe equipment on the highway.

Q. Just a moment. I asked you if you didn't state that you gave him the citation because he didn't have safety chains? Will you answer that yes or no?

A. I don't know what you are talking about, sir.

Mr. Mahoney: Just a minute, please. This is an attempt to confuse this witness. I will challenge the record. In his original statement on direct he said the citation was given for unsafe equipment. Another time he said for safety chains.

Mr. Wilson: Let us read the record.

The Court: Let us not waste any time. Have it

(Testimony of John D. Boyd.)

written up and you can read it to the jury when you argue the case.

Q. (By Mr. Wilson): I will ask you if it is not a fact that you told Mr. Gibbons that the reason you gave him the citation was because he didn't have safety chains? A. Mr. who? [91]

Q. Mr. Gibbons, this man right here.

A. I didn't give him a citation. I gave Mr. Carroll a citation.

Q. You are not trying to be funny, are you?

A. No, sir. That is the way it was.

Q. When Mr. Gibbons was asking you questions a moment ago—— A. That is right.

Q. He asked you why you gave him the citation?

A. Why I gave Mr. Carroll the citation?

Q. Yes. And you told him it was because Mr. Carroll didn't have safety chains on the truck.

A. That is right.

Q. And Mr. Gibbons asked you if you knew of any law requiring him to have the safety chains, and you said you did? A. Yes.

Q. Now, I asked you why you didn't give him a citation for not having a chauffeur's license?

A. Well, being a police officer, I figured maybe one violation was enough.

Q. You often do that, do you?

A. That was beside the fact, though.

Q. And it did not, as you say, excite any interest in your mind whatsoever that he didn't have a chauffeur's license, and he was driving [92] somebody's truck down the street with a trailer?

(Testimony of John D. Boyd.)

A. Right.

Q. Do you know of your own knowledge whether or not Mr. Carroll was an employee of Siebrand?

A. I only know what he told me.

Q. Do you know what disposition was made of that ticket?

A. Yes. A bond was posted and forfeited.

Q. How much? A. Ten dollars.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Raineri:

Mr. Raineri: Mark this as an exhibit here, Plaintiffs' Exhibit 5 for identification.

The Clerk: Plaintiffs' Exhibit 5 for identification.

(Said photograph was marked as Plaintiffs' Exhibit 5 for identification.)

Q. (By Mr. Raineri): Now, Mr. Boyd, did you take any pictures in connection with your investigation of this equipment, or this trailer, at the scene? A. I had some taken.

Q. That day, did you, or later on? [93]

A. That is right, that day.

Q. That same day there at the scene of the accident?

A. Yes, before anything was ever moved.

Q. I show you Plaintiffs' Exhibit 5 for identification, and ask you if that is a picture of the truck

(Testimony of John D. Boyd.)

you took, and the car there, the trailer and the car, rather?

A. That is right, that is the picture.

Q. Now, the purpose of these safety chains is to take care of a situation where in case the hitch breaks in any way, it would prevent the trailer from veering to either side, is that right?

A. That is right.

Mr. Wilson: I object as a conclusion.

Q. (By Mr. Raineri): Your answer was yes, is that right? A. Yes.

Q. Now, did you examine, or were you able to see the inner portion of the trailer?

A. We could see through the hole in the corner.

Q. Did you notice what the contents of this trailer were through this hole in the corner?

Mr. Wilson: I object as improper redirect.

The Court: He may answer.

The Witness: There was rides and [94] concessions, and stuff for a carnival.

Q. (By Mr. Raineri): There was rides equipment? A. Rides equipment.

Q. Now, you testified that this Mr. Carroll didn't explain why he didn't have a lock on the trailer, did he? A. Didn't explain a thing.

Q. Didn't give any explanation, did he?

A. No.

Q. He didn't say why he didn't have it, or try to explain it in any way, did he? A. No.

Q. All right, that is all.

(Testimony of John D. Boyd.)

Mr. Wilson: At this time I ask the Court to instruct the jury that there is no such law.

Mr. Raineri: There certainly is such a law.

The Court: I couldn't find it sometime ago.

Mr. Raineri: There is a statute that says you can't put——

Mr. Mahoney: I don't think that should be argued in front of the jury.

The Court: No. The Court will instruct the jury at the proper time.

Mr. Gibbons: May I ask one other question, your Honor, of the witness? [95]

The Court: Yes.

Recross-Examination

By Mr. Gibbons:

Q. Did you ask Mr. Carroll what kind of a hitch he had on there? A. Did I ask him?

Q. Yes. A. No.

Q. You didn't even ask him? A. No, sir.

Q. You didn't ask him whether he had safety chains on or not, did you?

A. I didn't have to ask him. I could see they weren't on.

Q. As a matter of fact, you didn't discuss the hitch with Mr. Carroll at all, did you?

A. When I wrote the citation, yes.

Q. Well, what did you ask him, if anything?

A. I told him he didn't have the proper equipment for pulling a trailer on a highway.

(Testimony of John D. Boyd.)

Q. Did you ask him any questions about it at all?

A. Only that I told him what he was supposed to have on it, why I was giving him the citation.

Q. As a matter of fact—— [96]

Mr. Raineri: You told him why you were giving the citation?

The Witness: That is right.

Q. (By Mr. Gibbons): As a matter of fact, didn't he tell you after he looked at it that something had broken off?

A. I don't remember him saying that, no, sir.

Q. You can't remember, is that right?

A. Yes, sir.

Q. You can't remember if he showed you what it was that was broken off?

A. No. He didn't show me anything.

Mr. Gibbons: That is all.

Mr. Raineri: That is all.

(Witness excused.) [97]

Mr. Raineri: I call Dr. Pohle, your Honor.

ERNEST E. VON POHLE

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Doctor, will you please state your full name?

A. Ernest E. Von Pohle.

(Testimony of Ernest E. Von Pohle.)

Q. And you are a duly licensed practicing physician for the state of Arizona, is that right?

A. Yes, sir.

Q. How long, Doctor, have you been engaged in the practice of your profession?

A. Since 1936.

Q. And where have you practiced, Doctor, all of those years?

A. Mostly in Arizona. Also in New Mexico, and some in California.

Q. Now, what medical schools did you attend?

A. I attended the College of Medical Evangelists in Loma-Linda and Los Angeles, California.

Q. And what degrees do you hold, what medical degrees? A. Doctor of Medicine. [98]

Q. Have you made any studies along the medical field since you graduated from medical school?

A. I go frequently to conventions and special meetings they have in different sections of the country.

Q. Now, Doctor, do you know one George Gossnell? A. Yes, sir.

Q. And do you know one Estella Gossnell, his wife? A. Yes, sir.

Q. Will you tell the court and jury when you first had occasion, or under what circumstances you first met the Gossnells?

A. We first met them in Tempe Clinic Hospital, I believe it was the 20th of February in 1953.

Q. Now, Doctor, I omitted to ask you, do you practice medicine in Tempe, Arizona?

(Testimony of Ernest E. Von Pohle.)

A. Yes, I do.

Q. And you have your office there?

A. 25 West 8th Street.

Q. And you also have a hospital there, do you?

A. Yes, sir.

Q. And did you see these people, the Gossnells, in your hospital? Were you called to attend them there? A. That is right. [99]

Q. Now, just tell the court and jury what condition—first, directing your attention to Mr. Gosnell, what condition you found him to be in, and what your findings were at that time, using your notes, if you wish, to refresh your memory?

A. Mr. Gosnell was in a rather critical condition upon his admission. He was badly injured in several portions of the body. He had a deep laceration over the left eye on the forehead, about eight centimeters, that is, three inches long.

The bone under the arch there was cracked. There were several cuts on his upper eyelid. There was an abrasion on the forehead, on the left side of the nose. There was a longitudinal deep cut on his upper and lower lips.

There were cuts around the mouth. Two deep lacerations on the left elbow, about two to three inches long. Several blood clots on the left side of the chest, that is, under the skin. There was a contusion of the fifth rib on the chest side, on the left side.

A fracture of the fifth and the eighth ribs. A hematoma or a blood clot on the surface of the

(Testimony of Ernest E. Von Pohle.)

right hand and on the back of the hand. There are two lacerations on the second finger of the right hand.

There was a compound fracture of the femur.

Q. Now, pardon me there, Doctor. What do [100] we mean when we say a compound fracture of the femur? Will you indicate on yourself what it is, and explain what you mean by "compound"?

A. In a compound fracture the bones protrude out through the flesh. Besides being broken, they break the skin all the way out, and the bones protrude out through the flesh. There is a connection between the outside and the fractures, and this was about the upper third of the femur.

Q. Of the left leg?

A. On the left leg, yes.

Q. You could see the bone protruding right through? A. You could see the bone there.

Q. One more question.

A. I have a few more——

Q. Pardon me for interrupting you. I just want to ask this one question on this point. Is the femur the largest bone in the body? A. I think so.

Q. All right.

A. It is the longest bone, at least. There was a laceration on the skin over the site of the fracture about four centimeters long. There was a comminuted fracture of the femur just above the knee. By comminuted we mean it had broken in several parts. [101]

(Testimony of Ernest E. Von Pohle.)

Q. Do I understand you to mean the femur was broken in two different places?

A. It was probably broken in ten different places, where it was broken down just above the knee, and then the fracture went down into the knee joint. There were several fractures that went down into the knee joint.

Q. That is other than the fracture you just described before? A. Besides the one above, yes.

Q. All right.

A. Then there were many abrasions to the left knee. There was a large deep abrasion on the anterior surface of the left leg, and a fracture of the fibula, which is the side bone. There are two bones in the lower leg, and the lateral one was also broken. There was an abrasion of the exterior and interior aspect of the left ankle.

Q. Did I understand you to say, Doctor, that there were two fractures in the fibula?

A. One fracture in the fibula.

Q. I didn't understand, then. Did you say something about the ankle?

A. There were abrasions, cuts, and bruises around the ankle.

Q. Now, was Mr. Gossnell conscious or [102] unconscious when you first saw him?

A. He was conscious.

Q. And what treatment did you give him at that time?

A. We were treating him—first of all, we try to stop the bleeding and make the patient comfort-

(Testimony of Ernest E. Von Pohle.)

able, and then we have X-rays taken, and evaluate the total of the injuries, and then institute the treatment which we think is the best for him, which we considered for him to be traction.

Q. Now, the X-rays that you speak of, do you have those X-rays with you?

A. I am sorry, I don't. I think they are in custody of the court here.

Q. Are you able to identify those X-rays?

A. I think so.

Mr. Raineri: I will have that marked Plaintiff's Exhibit 6 for identification. And this as Exhibit 7.

The Clerk: Plaintiffs' Exhibits 6 and 7 for identification.

(Said X-rays were marked as Plaintiffs' Exhibits 6 and 7, respectively, for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs' Exhibits 6 and 7, which [103] are X-rays, and using this shadow box, are you able to demonstrate to the jury the fractures you talked about here, from these X-rays?

A. Sure. This view demonstrates a fracture here of the upper third of the left thigh bone, and down here it shows a transverse fracture. (Indicating.) Here is a fracture that is overriding about a half an inch there. Then there is a fracture across here.

Q. Are you speaking now, Doctor, of the femur?

A. That is the left femur, yes, sir.

Q. That is the bone between the knee and the hip, is that right?

(Testimony of Ernest E. Von Pohle.)

A. That is right. There is another view of the same one, showing the proximal part, or the part closest to the body, which is pointing frontwards, and the other one is behind that. That is a side view one taken across this way.

The other one is one taken of the front view of it.

This shows while he was in traction it had been stretched out in order to let it back in to a correct position and alignment. This also shows a fracture at the site of the knee.

This shows some of the longitudinal fractures there. We will have some other ones here that [104] show the knee more in detail. Most of these with these iron rods on here show the progress of the treatment, so we will skip over them.

This is a picture of the chest. Right at this site here is the fifth rib. There is 1. 2, 3, 4, 5. As we see the fifth rib around right here we notice a fracture right as it goes around.

I don't see the fracture of the eighth one in that picture. This shows a little better the knee, a side picture of the knee.

See, here is a fracture in the upper third, and this is down just above the knee. You can see the fracture across there, and some of the separation of the fragments. This also shows more detail of the knee, the side view.

This shows a front view of the knee, a separation of the fragments. This also shows some of the fractures in the knee and the upper third.

Q. To save time, Doctor, do practically all the

(Testimony of Ernest E. Von Pohle.)

rest of those X-rays show some of the things you have already shown?

A. Most of those are duplicates that were taken as we continued with him.

Q. I show you Plaintiffs' Exhibit 7 marked for identification, and ask you what that is, if you know? [105]

A. These are the X-rays of Estella Gossnell.

Q. What, if anything, do they show?

A. I don't believe they show any actual—any broken bones. Yes. I take that back. She had some broken ribs, too.

Q. Are you able to demonstrate that?

A. Just a minute. I want to look up the record on that and see just where they are. We can point them out a little easier that way.

I don't recall right now whether we could ever demonstrate those broken ribs in X-ray.

Mr. Gibbons: Doctor, we can't hear you or see the picture, either one.

The Witness: Just a minute. I want to see it myself, and then I will stand aside, Mr. Gibbons. Sometimes it is hard to show pictures of the ribs that demonstrate fractures.

Q. (By Mr. Raineri): How do you determine that, then, Doctor?

A. Well, many times we take pictures of different views, and sometimes we never do demonstrate them in the X-ray, but later on if healing takes place, we feel a lump, and callous which forms at

(Testimony of Ernest E. Von Pohle.)

the site of the break stands up just like a little marble there.

Q. What was the situation in this case? [106]

A. I think Mrs. Gosnell had two broken ribs, as I recall.

Mr. Raineri: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 8 for identification.

(Said X-rays were marked Plaintiffs' Exhibit 8 for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs' Exhibit 8 marked for identification, and ask you if you know what that is?

A. These are pictures taken at the Grunow Memorial Clinic which are similar to the ones we took, only at a later date, which shows a fracture of the femur, and also some displacement of the femur down by the knee.

Mr. Gibbons: For the purposes of the record, he is testifying from X-rays which he says himself he didn't take. They were taken at the Grunow Memorial Clinic.

Mr. Raineri: Subject to further connection. We will connect it up.

Mr. Gibbons: If they will be later connected, I won't object.

The Court: All right, go ahead.

Mr. Raineri: I will connect it up. [107]

The Witness: There isn't complete healing on

(Testimony of Ernest E. Von Pohle.)

here. The position, the alignment is fairly good, but there is still no complete healing at the site of the fracture in the upper third of the femur. The knee appears to be fairly well healed.

Mr. Raineri: We will offer at this time all of the X-rays, with the exception of those taken—that is, we will offer Plaintiffs' Exhibits 6 and 7. We won't offer 8, because we will connect that up later.

The Court: All right.

The Clerk: Plaintiffs' Exhibits 6 and 7 in evidence.

(Said X-rays were received in evidence and marked Plaintiffs' Exhibits 6 and 7.)

Mr. Raineri: This has been offered in evidence.

Mr. Gibbons: Wait a minute. The officer testified he didn't take that picture. He said he had it taken.

Mr. Raineri: He said he took it on the scene.

Mr. Gibbons: He said he had it taken.

Mr. Raineri: I understood that he took it. I maybe didn't hear right.

The Court: He didn't. Find out who took it and bring him in here.

Mr. Gibbons: May it be withdrawn from the jury, [108] if your Honor please?

The Court: Yes.

Q. (By Mr. Raineri): Now, Doctor, it has been testified here by the Gossnells that they have expended down to the present date, or they show.

(Testimony of Ernest E. Von Pohle.)

rather, down to the present date, not that they have expended, but they have expended part and owe in part a sum of \$12,027.00 for medical expenses.

Based on the charges you made at your hospital there at Tempe for the treatment you rendered, and breaking these down as follows: Nurses, \$3,888.00. Fort Dodge Hospital, \$2,900.00.

Dr. Hartman, \$75.00. Dr. Knowles, \$960.00. Dr. Dawson, \$350.00. Medicine, \$85.00.

Would you say those were reasonable and necessary disbursements in a case of this kind?

Mr. Gibbons: May I ask a question on voir dire?

The Court: Go ahead.

Q. (By Mr. Gibbons): Doctor, are you familiar with the hospital charges at Fort Dodge, Iowa?

A. No, I am not.

The Court: They are high every place you go.

Mr. Gibbons: I don't think the witness is qualified to answer that question. [109]

The Court: Go ahead.

Mr. Raineri: Answer the question.

The Witness: I think that is a reasonable charge.

Q. (By Mr. Raineri): Now, Doctor, based on your examination of Mr. Gosnell, how long did you continue to treat him at your hospital?

A. We treated him for slightly over two months.

Q. And based on your observation of him during that period of three months——

A. Two months.

Q. Or two months, excuse me. And based on

(Testimony of Ernest E. Von Pohle.)

your knowledge of the fracture or fractures that he sustained, especially to the femur, could his disability well run down to the present date?

A. Yes, it could.

Q. And would you have any opinion as to how long that man will be bedridden such as he is today, to a reasonable degree of medical certainty?

A. I don't know if I can put it down to a reasonable degree of certainty, but he might have a——

Mr. Wilson: I object to it unless he can say——

The Court: All right.

Q. (By Mr. Raineri): Well, can you give an opinion as a medical [110] man, as a doctor, on that? A. He might have a permanent——

Mr. Wilson: Just a moment. I object as not responsive.

The Court: He might have a lot of things.

Q. (By Mr. Raineri): Do you have an opinion?

A. He might have a permanent disability. He might have a non-union.

Mr. Wilson: I object to that as not responsive.

Q. (By Mr. Raineri): Do you have an opinion to a reasonable degree of medical certainty as to whether or not this man will suffer permanent residuals as a result of these injuries he sustained?

A. I think he will, yes.

Q. Now, will that be for the rest of his lifetime?

A. Yes, sir.

Mr. Raineri: That is all.

(Testimony of Ernest E. Von Pohle.)

Cross-Examination

By Mr. Wilson:

Q. Doctor, you just came into the courtroom before you went on the stand, didn't you?

A. No, I was here a few minutes before.

Q. Did Mr. Gossnell have a broken ankle? [11]

A. I don't think so.

Q. You have got your records there. You could look it up, couldn't you?

A. We didn't have him down for a broken ankle, no.

Q. Would you have known in two months at your hospital whether or not he had a broken ankle?

A. Yes.

Q. And you would say he didn't have a broken ankle?

A. That is right.

Q. Is he under your care now?

A. No, he is not.

Q. How long since he has been under your care?

A. Since the 25th of April of 1953.

Q. And did you have him up when he was with you under your care?

A. No.

Q. Do you know why he is horizontal at the present time, from a treatment standpoint?

A. Well, I couldn't say with certainty. I haven't examined him. I haven't taken X-rays of him, and so from the certainty of my own knowledge, I couldn't say.

Q. Does a man of his age, does his metabolism work better, and the calcium form better in the

(Testimony of Ernest E. Von Pohle.)

bones [112] when he is on crutches, or sitting up, or in a wheelchair?

A. Yes, the more motion they have, the better metabolism they have.

Q. Now, you are well acquainted with his injuries, are you not?

A. Well acquainted with——

Q. His injuries? A. Oh, yes, sure.

Q. To your knowledge, he sustained no injuries other than the ones you treated for two months?

A. That is right.

Q. Do you know of any reason that he shouldn't be in a wheelchair or on crutches at the present time, to your knowledge?

A. Well, I just mentioned that I haven't examined him for a year, so I shouldn't pass an opinion, or I don't know.

Q. I say, do you know of any reason he shouldn't be in a wheelchair or on crutches, or in an up and down position at the present time?

A. No, I don't know now.

Q. If he could be put in that position, would he be better off as far as healing is concerned?

Mr. Raineri: I will object to that question, your Honor, because that is assuming that he could [113] be placed in that position. There is no showing here that he can be.

The Court: He may answer if he has an opinion.

Mr. Raineri: If he didn't examine him, he couldn't say.

The Witness: That is right. I didn't examine

(Testimony of Ernest E. Von Pohle.)

him, so I am in no position to assume anything about him now.

Q. (By Mr. Wilson): I don't ask you to assume anything, Doctor, at all. Do you know, from his injury, of any reason why a cast can't be put upon him that would allow him to be in a wheelchair or on crutches?

A. I don't know what his condition is at the present time.

Q. You know what his condition was, do you not?

A. Sure, I know what his condition was. At that time he could not, when I last saw him, he could not have been up on crutches or in a wheelchair.

Q. Why? Why?

A. There were several reasons. When there is a broken bone, there is often what we call a fat embolism. A little globule of fat will get into a vein and will go to a lung and cause an embolism, or it will cause a large clot in the lungs, which he happened to have a couple of while he was there. And [114] to have gotten him up and move him around would have probably, if he had had another one, would have been fatal.

Q. Did you expect him to have lung trouble from being down on his back after an accident of this sort?

A. We expect any fractured bone to have——

Q. Did you expect him to have pneumonia?

A. We expect any person we know that has any

(Testimony of Ernest E. Von Pohle.)

fractured bone, even though it be a little finger, you can get a fatty embolism which might cause immediate death.

Q. So you want this jury to believe that you put all of your people with broken bones, even if it is a little finger, in bed for a year or fourteen months, for fear of a fatty embolism, is that correct?

A. We immobilize that so there won't be that danger of a fatty embolism.

Q. So you put a cast on the little finger. Then if a man walks around, or sits up, or can walk on crutches, he forms calcium quicker, and the thing heals quicker, isn't that right?

A. That is right.

Mr. Wilson: That is all. [115]

Redirect Examination

By Mr. Raineri:

Q. Now, Doctor, based on your examination of these two X-rays, Plaintiffs' Exhibit 8, would that show that man, would it appear from those X-rays that a man in the condition that is revealed by those X-rays would be bedridden, or could be bedridden from that condition?

A. Yes. I see no reason why he shouldn't be, because there isn't enough callous for that femur to bear weight at the present time.

Mr. Raineri: That is all.

(Testimony of Ernest E. Von Pohle.)

Recross-Examination

By Mr. Gibbons:

Q. Doctor, you first treated this broken leg sustained by Mr. Gossnell with traction, is that right?

A. Yes, sir.

Q. That is a matter of suspending and placing certain weights or pressures against the leg to hold it in position, is that right?

A. That is right. And also to pull out the fragments that are overlapped.

Q. In that manner you were able to get the bone back together? A. We got it in position.

Q. In position to heal? [116]

A. That is right.

Q. Did you later apply a cast to the leg?

A. We applied a cast just before he went to Fort Dodge.

Q. Will you explain to the jury why that cast was applied?

A. The cast was applied so that he could be moved.

Q. Well, isn't that the usual final treatment for a broken leg, to put it in a cast?

A. There is several different methods of treating broken legs, depending on the circumstances of each individual case.

Q. That is one of the usual treatments, isn't it, Doctor? A. Sure, that is one of them.

Q. That is widely used in this area, at least,

(Testimony of Ernest E. Von Pohle.)

isn't it, to your knowledge? A. Yes.

Q. Isn't that the treatment you used?

A. Yes, we use that. No, we used traction. We didn't put him in a cast until he was ready to be moved.

Q. In other cases, don't you use a cast?

A. Sometimes yes, sometimes no.

Q. You saw this cast that was applied to [117] Mr. Gossnell's leg, isn't that right? A. Yes.

Q. And at least one usual form of treatment is that cast to have remained on that leg until the leg was healed, isn't that true?

A. That is right.

Q. And it could have remained there until his leg was well, right? As far as you know?

A. Well, it is hard to definitely determine whether it is completely healed after we remove the cast, and we have to take more X-rays.

Q. Doctor, I just asked you, it is usual in your practice, or at least the local practice here, to leave that cast on until the leg is well, or you think it is well, isn't that right?

Mr. Raineri: I object as asked and answered.

Mr. Gibbons: He has not answered.

The Court: Answer it again.

The Witness: Yes, we usually leave it on, or else remove it and put another one on a little tighter.

Q. (By Mr. Gibbons): Now, was Mr. Gossnell in condition to be on crutches at the time you last saw him here in Phoenix and before he left for Fort Dodge? A. No. [118]

(Testimony of Ernest E. Von Pohle.)

Q. He was not? A. No.

Q. Do you know what treatment he received after he went back to Fort Dodge? A. No.

Mr. Gibbons: That is all.

Redirect Examination

By Mr. Raineri:

Q. One more question. When you speak of the fibula, what part of the leg do you speak of?

A. In the leg, the lower leg, from the knee to the ankle, there is two bones; the tibia is the large shin bone, and the fibula is the small one on the outside.

Q. Where was the fibula fractured in this case?

A. Just above this ankle bone there, just above there. (Indicating.)

Mr. Raineri: All right, that is all.

The Court: That appears to be all, Doctor.

(Witness excused.)

Mr. Mahoney: Your Honor, could we suspend at this time? We have a couple more witnesses, but they are not available until tomorrow morning.

The Court: All right. We will have to suspend until eleven o'clock. [119]

Mr. Wilson: May I ask counsel if they will stipulate to the examination of Mr. Gossnell at a time that is convenient to them today or tomorrow, by a Dr. Bishop?

The Court: All right.

Mr. Mahoney: Surely, we will stipulate.

The Court: Report back at 11 o'clock tomorrow, please.

Keep in mind the court's admonition.

(Thereupon at four o'clock p.m. an adjournment was taken to 11 o'clock a.m. the following day, Wednesday, April 14, 1954.) [120]

Wednesday, April 14, 1954—11:00 A.M.

The Court: Call your next witness.

Mr. Mahoney: Dr. Hartman.

STANFORD F. HARTMAN

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mahoney:

Q. Will you state your name, please?

A. Stanford F. Hartman.

Q. Your occupation?

A. I am an orthopedic surgeon. [121]

Q. How long have you been an orthopedic surgeon, Dr. Hartman?

A. Approximately ten years.

Q. What is your educational background in that regard?

A. I graduated from the University of Tulane in New Orleans.

Q. That was your general medical degree?

A. That is right.

(Testimony of Stanford F. Hartman.)

Q. Tulane. And did you have any special training in orthopedics, Doctor?

A. For the past ten years, yes, sir.

Q. Now, Dr. Hartman, did you examine George Gossnell, one of the plaintiffs in this case?

A. I did, sir.

Q. And I believe you have a report there in your hands, have you not? A. I do.

Q. Do you want to refer to that in your testimony? A. If I may.

Q. When did you first see Mr. Gossnell, Dr. Hartman?

A. According to my records, sir, I saw him on February 26, 1953.

Q. Where did you see him? [122]

A. At the Tempe Hospital.

Q. What did you observe at that time with regard to his physical condition?

A. He had been in a recent accident, according to the records, which was on February 20, 1953. And he had many fractures, a considerable amount of lacerations and contusions, and so forth, and if I may read them, I will.

Q. Yes.

A. And I will explain the nomenclature.

A simple fracture of the left fibula, mid third. Simple means it was not through the skin, or the skin was not broken. And the fibula is the small bone in the leg, on the outer side. And mid third, it would be approximately right there (indicating).

There was a simple fracture of the fifth rib. There

(Testimony of Stanford F. Hartman.)

was a simple comminuted fracture of the left kneecap.

Comminuted in that case means more than one fracture, more than one piece in the kneecap.

Multiple lacerations of the forehead and upper eyelid, left elbow, right mid finger, and left thigh, laterally, right here on the lateral side of the thigh. Left knee anteriorly. Abrasion over the left leg and ankle.

And there was a simple comminuted fracture [123] around this region here, the orbit on the left. And a fracture in the lower femur, that is the big bone here in the thigh above the knee joint. A compound comminuted fracture. In other words, there was an opening in the skin over the—the opening being here, and the fracture was in the mid and upper third of the left femur, which, as I say, is the thigh bone.

That is it, sir.

Q. The chief fracture, of course, was the fracture to the left femur, was it not?

A. That is right.

Q. How many times did you visit the patient there at the hospital?

A. I think I saw him three times.

Q. And did you prescribe any course of treatment at that time?

A. Yes, I did. I helped line up balanced traction, and each time I visited him would help Dr. Pohle change the alignment, and so forth, as we thought it should be.

(Testimony of Stanford F. Hartman.)

Q. Now, Dr. Hartman, did you advise an operation, or anything of that nature, at that time, a reduction?

A. At that time the only possible type of treatment advised was a traction. There are several [124] kinds of traction. One is skeletal, meaning through the bone, and the other is on the skin. Therefore, a skeletal traction was put through the tibia, that is, the big bone in the leg, and he was lined up in balanced traction, so that he could be taken care of, his different duties, and so forth, while in this balanced traction, so he could raise up and down and be cleaned, and have the usual type of treatment that a bed patient requires.

It was thought, however, at the time when first seen that an attempt to operate on his femur, or to do an open reduction, was out of the question because of the abrasion and laceration over the fracture site. I was worried to make a recommendation of that, because of possibility of an infection setting up in this bone, and this happens to be the biggest bone in the body, so it was thought he should have conservative therapy until it was healed, and then perhaps have an open reduction.

Q. Now, Doctor, the evidence shows that a month or so thereafter he went back to Iowa. Mr. Gossnell?

A. Yes.

Q. And when was the last time that you saw him?

A. According to my records, sir, it was on March the 1st.

Q. Of this year? [125]

A. Yes, sir.

(Testimony of Stanford F. Hartman.)

Q. And where did you see him, Doctor?

A. Here at the hospital, where X-rays were taken and examinations made.

Q. At the Good Samaritan Hospital?

A. Yes. And X-rays were taken, and an examination——

Q. Did you have X-rays taken of him at that examination, Dr. Hartman? A. I did, sir.

Q. They were taken at your direction, were they not? A. That is right.

Q. I show you Plaintiffs' Exhibit 8 for identification, and ask you if you can identify the contents?

A. All right, sir. I would like to change that. I didn't take them at Good Samaritan, sir. I meant at the Grunow Clinic.

Q. All right, fine. You recognize those films, Doctor? A. Yes, I do, sir.

Q. And they are films of what, or of whom?

A. Of the patient, Mr. Gossnell, and of the left femur and the left shoulder.

Mr. Mahoney: We offer those in evidence, your Honor. [126]

Mr. Wilson: When were they taken, Doctor?

The Witness: 3/1/54.

The Court: Any objection?

Mr. Wilson: No objection.

Mr. Gibbons: No objection.

Q. (By Mr. Mahoney): Now, Doctor, let me ask you this: What did your examination on March

(Testimony of Stanford F. Hartman.)

1st of this year consist of? You mentioned these X-rays?

A. Yes, sir. Well, it was impossible to examine under the cast, as the man was in a body spica. However, I did examine the position of the—the angle of the knee and the foot in the spica, the left elbow, the previous laceration area over the left eye, the left upper extremity, the elbow, and the fingers, and so forth.

And his hands. And if you remember, I mentioned he had an injury to his right mid finger, and that was examined.

In other words, the points of interest that had been mentioned previously in his accident were examined.

Q. I see. Now, would you step down to the view box here and interpret those X-rays, please?

The Clerk: Plaintiffs' Exhibit No. 8 in [127] evidence.

(Said X-rays were received in evidence and marked Plaintiffs' Exhibit 8.)

Q. (By Mr. Mahoney): Now, these are the X-rays taken under your direction March 1st of 1954, is that right? A. That is right, sir.

Now, this view box shows two pictures. The one here on my left, the furthest over, is an AP view, and that means it is looking at it right straight this way. In other words, AP. And this view here is a lateral view, taken from the side, in other words, to show two different planes.

(Testimony of Stanford F. Hartman.)

Also, one can see a fracture in this area, or evidence of a fracture. And also in this area. (Indicating.) And also you see evidence of a fracture in the lower end of the femur, which I mentioned previously, and one on this lateral view.

The patella does show, but it is difficult, however, to show it from this distance, of any change in there, but with the previous films it could.

Now, interpreting this X-ray through the cast, first of all, we must think of position. Well, the angle here I think is very good, as far as alignment is concerned. This fracture I think is well aligned, and this is, too.

Nature is very kind to us in throwing down [128] callous, and I think from the AP it looks very good.

From the lateral, however, one can see that the general alignment is fine, but there is a little anterior displacement of the upper fragment, as you can see.

Now, in interpreting healing here, we could say there is a healing fracture, but to me it doesn't show solid union; in other words, a sufficient amount of healing that the cast could be removed, so this man can get up and get around, and walk sufficiently, and return to activity.

The fracture below does—I feel in this length of time he should be able to bear weight on here, considering like fractures of this nature in the histories, and so forth.

Now, this is the one question that bothered us a great deal. As I mentioned, there was a laceration

(Testimony of Stanford F. Hartman.)

over the lateral side, and it was thought it was compound, in other words, continuity between the outside and the bone, rather than the simple, where the skin is not broken.

It was thought that an internal fixation would be the one to follow; however, because of the laceration I mentioned before, we didn't think so. So we tried traction, and as you can see, the alignment has been held very well. [129]

But it has entailed a man being in bed and non-active, and so forth, in this position. If an open reduction had been carried out, I feel he would have been able to get up and get around by this time. But again we were unable to do it because of the type of injury presented at the time I first saw him.

Of course, these pictures are taken through the cast. A picture also was taken of the left shoulder, because the patient did complain of some limitation in the motions of the shoulder, passively and actively. It shows some lack of use, in other words, some decalcification, which is present when an extremity isn't used, or a bone isn't used.

However, it doesn't show any fracture site in this area. It does show some roughening on the upper end. However, I don't think this is evidence of any fracture.

Another view taken of the same shoulder, with rotation, shows the same decalcification, but no evidence of any fracture.

Q. You say that comes from inactivity?

A. That is right, sir.

(Testimony of Stanford F. Hartman.)

Q. Now, Doctor, you testified that the degree of healing has not reached a point where weight can be placed on this limb, is that correct?

A. That is my feeling, sir. [130]

Q. It is in evidence here that very substantial medical expense has been incurred during the last 14 months. Could you tell us whether or not there will be a substantial medical expense in the future for this leg for Mr. Gossnell?

A. I think in any type of treatment that one would venture to follow in the future here will entail quite a bit of medical expense, yes.

Q. Could you state as a medical opinion, Doctor, whether or not this man will probably be permanently disabled by this injury?

A. Yes, I think he will have some permanent disability, yes.

Q. It is in evidence, Doctor, that his occupation was that of salesman, and that he was involved in getting in and out of a car, and doing the usual things that a salesman would do.

Would it be your opinion that his ability to earn his living in that fashion will be permanently impaired in the future?

A. I would like to answer that this way, sir.

Here is a man certainly past the growing state. In other words, he is not in his early teens, or thirties, or forties, and as we know, he did suffer severe injuries.

His treatment has been that of traction and [131]

(Testimony of Stanford F. Hartman.)

immobilization, the traction which was carried out here, and immobilization, which you can see, in the cast, which is inactivity.

From past experience, we know that any person who has one joint, or many joints immobilized, or kept still for a period of time, have a tendency to have limitation in motion. And I would expect him not to be any different from anybody else, even whether he had had any injuries, I mean, any fractures of the bone or not.

Q. Doctor, in your opinion, how long will Mr. Gossnell be laid up in bed like this in the future?

A. That is determined exactly on the type of treatment he has. If the present treatment, immobilization, is carried out, it will be for many months; first, in the cast, and until sufficient amount of callous permits to remove the cast. It may be necessary then to even apply a long leg brace, so he will be able to get walking and get some motion in his knees.

Now, if the method of treatment would be that of internal fixation, requiring a pin down through the femur, that would cut down the period of time, but it would mean an operation. And here is another thing that would have to be considered, would be the history that he does have of a blood clot, or occlusion, [132] which occurred while he was at Tempe Hospital. So one would have to weigh the two types of treatment, and talk to the patient as to which he would rather have. I feel if an opera-

(Testimony of Stanford F. Hartman.)

tive procedure was carried out, his time of immobilization and morbidity would be reduced.

Q. Could you limit that? Would it be many months, or could you pin that down?

A. Yes. If the present treatment is carried out, it will be, according to the films I took on March 1st, 1954, it may be four to seven or eight months in the cast. We may be able to bring it down. It is according to recheck X-rays, according to the amount of callous laid down. Nobody would take it off until sufficient callous, in his own mind, was there because he wouldn't want it angled and wouldn't want to lose the position he has.

Then, of course, physiotherapy would be necessary to start moving these joints, and after immobilization of this type, we do get swelling, and he may present a good deal of swelling, and some circulatory discomfort, and so forth. I mean redness, and so on, probably from the period of immobilization.

Now, to that part, before he would be up and around, getting back to activity that he would like to carry out, I imagine it would be a year to a [133] year and a half.

Mr. Mahoney: Take the witness.

Cross-Examination

By Mr. Wilson:

Q. Doctor, could you state the percentage of permanent injury that you estimated?

A. That is rather hard to do, sir. At this time I feel that he is too early to rate.

(Testimony of Stanford F. Hartman.)

Q. Is that not a common thing to do, to estimate the percentage of permanent disability?

A. I usually always try to, yes, sir.

Q. You don't think it will be 100 per cent permanent disability? A. Oh, no.

Q. You think it will be 10 per cent?

A. I would rather not say. It would be very difficult to tell until at least after the cast was removed, and see how these joints move, and see how the circulatory system comes back, and so forth. I think it is a little bit too early.

Q. You were called in as a specialist consultant to Dr. Pohle? A. That is right, sir.

Q. And you put the cast on him, or the cast was put on——

A. I didn't put the cast on, sir. [134]

Q. I didn't mean this one. I mean the one when he went to Iowa.

A. No, I didn't put that on, sir.

Q. You recommended putting it on?

A. Yes, sir.

Q. That is one time you saw him, practically the time he left for Iowa?

A. I saw him before he left.

Q. And you had seen him before that?

A. Yes.

Q. Did you say three times?

A. I think three times.

Q. And you know that he had a Knowles bridge put on after he went to Iowa?

(Testimony of Stanford F. Hartman.)

A. I had a record that he had been treated by Dr. Knowles, yes, sir.

Q. With a Knowles bridge?

A. That is what I understand, yes, sir.

Q. Did you ever use a Knowles bridge?

A. No, I never did.

Q. That would be correct if I assumed that the procedure which has been followed with this man is not quite what you would have recommended, since he has been in Iowa?

A. Well, counsellor, there are many, many ways of treating fractures, open reduction, closed [135] reduction, and even the different open reductions, there are different methods.

At the present time we are using intermeduallary nails, which before World War II if anybody would have suggested it to us I know we would have been aghast. And we were all surprised when we found men walking a few weeks after a fractured femur, and yet there they were walking, over in Europe, and they had been in a German camp. And we took pictures, and there were these intermedullary nails. So you see, methods have changed.

And I have used multiple pin methods with incorporation in casts, bridges, and so forth. And I used to use plates. Now, at the present time, if possible, I try to use intermadullary, that type of thing, because I have had better results. But everybody has his own opinion on that.

Q. If this man were up and about, or at least upright in some manner, would that increase his

(Testimony of Stanford F. Hartman.)

body metabolism, and the improvement of the formation of the substance required for the knitting of bones? A. We think so.

Q. And do you know of any reason that this man couldn't be in a wheelchair?

A. It would be rather hard, the way he is. Of course, the way we like to treat people is get [136] them on their feet just as soon as possible. However, if I was going, if I selected this type of treatment, immobilization, which we all do, we all go into it many times, I would not want to take the cast off until I felt it was ready.

Q. Doctor, couldn't he be in a wheelchair without taking the cast off?

A. Well, he is in about this position, and if he were brought up too much, it would force him in there and may cause some gastric distress, and so forth. Probably he could be raised a little bit more than perfectly flat, but I don't think a wheelchair would be very comfortable for him.

Q. Could the type of cast be put on that would allow him to be in a wheelchair?

A. Not right now I don't think, sir. You see, you have to put a cast—to be an efficient cast, it has to be above and below, I mean, a joint above and a joint below the fracture site.

Well, now, the fracture is, from the X-rays, in the mid and upper third of the femur. Therefore, we would like to have it up above the hip joint to get immobilization. Otherwise, you have motion in there. That slows down healing.

(Testimony of Stanford F. Hartman.)

Q. Now, one can walk on crutches with the portion of the leg that is injured completely [137] immobilized, isn't that true? He doesn't have to bear weight on it to walk on crutches?

A. I have had people walk on crutches with long leg casts, yes, but he doesn't have a long leg cast. It would be difficult to do it with this apparatus. Children do, but not many adults.

Q. But the type of cast could have been put on him to have him so that he would be more upright and walk on crutches?

A. Well, sometimes we put a cast on just from the base of the toes up, and not include the other side, but in order to do that it has to be strengthened in the angle here, and many times it requires a heavier cast and more weight is involved than if it is put on the other side. So that doesn't help too much.

Q. The general alignment, that is, on March 1st, that is the last you know about it—the general alignment from the front view was very good, and from the lateral view was quite good?

A. Satisfactory.

Q. Except there was some—It was satisfactory?

A. Yes.

Q. And there is healing?

A. It shows some healing, yes, sir. [138]

Q. Is it coming all right, would you say? Did I understand you to say that it was coming along and was healing, but you didn't believe for sure there was enough healing to take the cast off?

(Testimony of Stanford F. Hartman.)

A. I said I didn't believe there was enough healing to remove the cast. There is no doubt in my mind of that.

Q. This instance of where he was on crutches in Iowa, and where something occurred to him in regard to the leg, you read that in the record, didn't you?

A. I remember something about it, yes, sir.

Q. You remember what that was that occurred?

A. No, I don't. I just read it. There had been something there, and I don't have the records of that, sir.

Q. He said he felt that the bone bent?

A. I wouldn't know the feeling a person would have with a bent bone.

Q. I didn't mean necessarily there was a pain, but it was his understanding it was bent.

A. That would be angling at the fracture site. Bending to most people means angulation at the fracture. That is why I don't want to take it out now. If it is taken out too soon, they do angle.

Q. Do you feel whatever occurred set him [139] back?

A. We certainly don't like to see them angle, sir.

Q. He had some mishap of some sort, as you recall from the record? A. Apparently.

Q. Broken femurs are not uncommon, are they?

A. I see quite a few, sir.

Q. People get over them and get well?

(Testimony of Stanford F. Hartman.)

A. Our percentage is very good getting well, thank heavens. It used to be that they didn't but the methods are better now.

Q. You have seen bones, haven't you, Doctor, where the femur healed like this, and the fellow seemed, except for his leg being short, seemed to get along as well as otherwise?

A. I have seen fractures of that nature in the femur, what we call overriding, that heal very well and give a very good function.

Q. It would make his leg short, though?

A. There would be a shortness, yes, particularly if he was past the growing age, and he is.

Mr. Wilson: That is all.

Mr. Mahoney: That is all. May this witness be excused, your Honor.

The Court: Yes.

(Witness excused.) [140]

Mr. Raineri: I call Mr. Deuel.

DONALD EDWARD DEUEL

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you please state your full name?

A. Donald Edward Deuel.

Mr. Raineri: May these be marked for identification, if the Court please.

(Testimony of Donald Edward Deuel.)

The Clerk: Plaintiffs' Exhibits 9 to 13, inclusive, for identification.

(Said photographs were marked as Plaintiffs' Exhibits 9 to 13, inclusive, for identification.)

Q. (By Mr. Raineri): And what is your business, Mr. Deuel?

A. I am a photographer here in Phoenix.

Q. And were you asked to take certain pictures of an automobile that was involved in an accident near Tempe approximately a year or so ago?

A. Yes, sir.

Q. And were you also asked to take pictures of the scene of that particular accident?

A. No, sir, no photographs of the scene.

Q. I show you Plaintiffs' Exhibits 9 through 13, inclusive, and ask you what those are, if you [141] know? A. These are the photographs.

Q. Will you look them all over first?

A. Okay. These are the photographs which I took. I did not recognize this one.

Q. When you say this one, for the record you are referring to Exhibit 9? Plaintiffs' Exhibit 9, you did not take that one?

A. No, I had nothing to do with that.

Mr. Wilson: May I ask him on voir dire, your Honor?

The Court: All right.

Q. (By Mr. Wilson): Did you take these pictures at the scene of the accident? A. No, sir.

Q. Where did you take them?

(Testimony of Donald Edward Deuel.)

A. Over at the V & B Auto Wrecking yard between Tempe and Mesa.

Q. And it is a place where there are many wrecked automobiles? A. Yes, sir.

Q. And what day did you take them on? Have you got a record of it?

A. I have a record of it. I don't recall in my mind the exact date.

Q. Did you mark it on the pictures? [142]

A. I have it dated with my negative files, what date they were taken. I don't know whether I marked them on the back or not.

Q. You took a picture of this car because someone asked you, or pointed it out, or anything of that sort? A. An attorney asked me to take it.

Q. What attorney?

A. It was Mr. Cracchiolo.

Q. Did he make any statement to you as to this being the A car or the B car, or what it was?

A. He described the car to me, so I knew what car it was.

Q. Over the telephone?

A. Personally and over the telephone. We had two appointments on it.

Q. He told you to go there and take a picture of a car that was described like this?

A. Described the car, the license, and all the details so I would not miss it, and which car we wanted, and so forth.

Mr. Wilson: No objection.

(Testimony of Donald Edward Deuel.)

Mr. Gibbons: No objection.

Mr. Raineri: We will offer 13, 11, 12, and 10 as Plaintiffs' Exhibits in evidence.

The Court: All right. [143]

The Clerk: Plaintiffs' Exhibits 10, 11, 12, and 13 in evidence.

(Said photographs were received in evidence and marked Plaintiffs' Exhibits 10, 11, 12, and 13, respectively.)

Mr. Raineri: May we hand these to the jury, your Honor.

The Court: You may.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Raineri: If it please the Court, I would like at this time, before we rest, to offer the mortality tables into evidence.

They show that this man had a life expectancy of eleven and some tenths years.

The Court: All right.

Mr. Raineri: At this time, too, we would like to offer any and all other exhibits that we may have presented here that have not been offered, that is, make a blanket offer.

The Court: You better find out what they are.

Mr. Raineri: We will withdraw that offer. I understand from the Clerk they are all offered.

Mr. Mahoney: We rest, your Honor.

The Court: All right. You may proceed.

Mr. Wilson: May it please the court, we [144] would like to make a motion, and I wonder what your Honor's pleasure is.

The Court: We will excuse the jury until two o'clock. Come back at two.

(The Jury was excused.)

The Court: Go ahead with your motion.

Mr. Wilson: May it please the Court, on behalf of P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, we move for a directed verdict in their favor, and against the plaintiffs, on the following grounds:

One, there is no evidence of the moving parties having driven the vehicles, or either of them, in a negligent, careless, reckless, or wanton manner.

Two, there is no evidence of their having driven the vehicles in any manner.

Three, there is no evidence that the vehicle of the moving parties was on the highway with their consent, or in the course of their business, or in any kind of a joint enterprise of any sort. There is nothing at all to connect that.

Four, there is no agency shown between Carroll and P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus & Carnival, no agency whatsoever, not any that could be attributed to it that I know of. [145]

The Court: You want to join in that motion?

Mr. Gibbons: I do, your Honor.

The Court: Motion denied.

Court will stand at recess until two o'clock.

(Thereupon a recess was taken until two o'clock p.m., of the same day.) [146]

Wednesday, April 14, 1954—2:00 P.M.

The Court: You may proceed.

Thereupon the defendants introduced the following evidence:

Mr. Wilson: I will call Dr. Bishop.

W. A. BISHOP, JR.

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, please?

A. W. A. Bishop, Jr., M.D.

Q. Are you admitted to the practice of medicine in the state of Arizona? A. Yes, sir, I am.

Q. What education do you have on the [147] subject?

A. I graduated from medical school at Baylor University when I was in Dallas in 1935. I interned at the Cincinnati General Hospital at Cincinnati, Ohio, from July, 1935 to July, 1936. I remained preparing for my specialty in orthopedic surgery at the Cincinnati General Hospital.

For the following year, from July, 1937, to 1938. I was orthopedic resident at the Cincinnati General Hospital, and at the Crippled Children's Hospital in Cincinnati, then moved to Oklahoma City where

(Testimony of W. A. Bishop, Jr.)

I was resident at the University and Crippled Children's Hospital from July, 1938, to July, 1939.

I was research fellow in orthopedic surgery at the University of Oklahoma Medical School from July, 1939, to January, 1940. I have been practicing orthopedic surgery since then.

Q. What is orthopedic surgery?

A. Orthopedic surgery is that specialty which deals with diseases and the injuries of the spine and extremities.

Q. What do you mean, the spine and extremities?

A. We are more commonly known, probably, as bone and joint surgeons.

Q. Do you take any other kind of practice?

A. No, sir, I do not.

Q. Do you know George Gossnell? [148]

A. I saw Mr. Gossnell first this morning in the office.

Q. In your office? A. Yes, sir.

Q. Did you examine him?

A. Yes, sir, I did.

Q. Would you tell the court and jury what you found upon this examination?

A. Well, as is customary, we always take a history before examining a patient. While the X-rays were being taken, I obtained from Mr. Gossnell the history that he had had injuries on the 20th of February, 1953. I was more interested in what he had had in the way of treatment, and what had happened to him since then.

He had had multiple injuries, particularly to his

(Testimony of W. A. Bishop, Jr.)

left thigh, for which he was treated in traction by Dr. Von Pohle at the Tempe Clinic Hospital for approximately nine weeks, a cast being applied approximately one week before that.

Then he travelled by plane to Fort Dodge, Iowa, where he was admitted to the St. Joseph's Hospital, under the care of his family physician, Dr. Emerson Dawson, and who called in Dr. Fred Knowles, an orthopedic surgeon.

After he had been there approximately three [149] weeks, the cast was removed, and an operation was performed on the 25th of May on the fracture in the upper left thigh, at which time the bone was opened up, and to hold it in position, pins were placed through the skin two above and two below the fracture site, and that these were connected with an apparatus to get rid of the cast, to hold the bone in place, so that the cast wouldn't have to be in position.

That he remained in the hospital, then, until—for a few more weeks, and then he went home on the 11th of August, walking part time on crutches.

He remained at his home until the 25th of October, when he was readmitted to the hospital. The pins were removed, the pins were taken out of the bone. Then he gave the history that two days later, or on the 27th of October, 1953, that while being turned in bed that the fracture in the upper portion of the thigh bone or femur on the left rebroke or bent, and that his present cast, which he is wearing now, was applied on the 27th of October, two days after

(Testimony of W. A. Bishop, Jr.)

the pins had been removed, and he still has that cast in position.

He further told me in response to our conversation and questions that he had had some pain in his chest, where he had been told that he had some fractured ribs on the left, that that pain in the [150] left chest had bothered him up until several months ago, but he had had no trouble whatsoever since.

That up until last fall, the middle of the summer, or last fall, that he had had some dizziness when he quickly turned his head to the left, but he said that had also cleared up.

The only discomfort that he has at the present time, or has had for any period of time, is some discomfort in his upper left thigh, which he indicated as being in the region of where the break is that there has been so much difficulty with. In coughing or sneezing he would have some discomfort in that area. No other discomfort, however.

In asking why he made this trip in the cast, and so forth, he said that it was his understanding that the cast was going to be removed when he got back and some X-rays taken to determine what type of treatment, if any, that he would have to have after that.

Q. Would you have pursued the type of treatment that this man has received?

A. Mr. Gossnell is 66 years of age, and although the types of treatment that he has used, the first type of treatment, the traction, was developed during World War I, and the type of pin fixation which most of us are acquainted with as the stator [151]

(Testimony of W. A. Bishop, Jr.)

type of treatment, which was publicized during the first part of World War I is pretty well discarded for the reason that too many of those patients develop non-union or delayed union, or fail to heal early, as has happened in this case.

I wouldn't have treated him as he has been, but patients are treated in this type of manner, as illustrated by this particular type of patient.

Q. Are you acquainted with the Knowles bridge?

A. Yes, sir, I am. It is very similar to the Clayton bar. Dr. Clayton lives in Forth Worth, Texas. It is the same principle as the Roger Anderson apparatus, as the stator splint which I have just mentioned. They all have identically the same principle of external immobilization, is what it amounts to. The idea back of it all is to get rid of the cast, to permit motion in the joint above and below, so there will be better circulation.

Q. Did you take pictures of him?

A. Yes, sir, I did. We took a number of X-rays, including his skull, his chest, his pelvis, his femur or thigh bone on the left, and his tibia or bone below the knee on the left. I have those films with me.

Q. Were you impeded in your examination by the cast? [152]

A. After all, I couldn't examine the left lower extremity, and as far as I can determine from talking to Mr. Gossnell, that is the only thing that has bothered him now, is the fact that he has had to wear the casts for those fractures that did occur

(Testimony of W. A. Bishop, Jr.)

to that extremity, and of course we couldn't examine it with the cast on.

Q. Does it impede the taking of X-ray pictures?

A. You can get X-ray films. After all, an X-ray is merely a shadow, and it is like trying to look through a curtain, so to speak, at something that you are seeing a shadow of beyond. You can't get nearly as good detail of the bone as you can if you don't have the cast on, because you have superimposed on top of the bone the shadow of the cast, and the cast does cast a shadow in the X-ray.

Q. Could this cast be removed for purpose of examination, and be replaced without damaging Mr. Gosnell?

A. I would think so, yes, sir. This cast was applied—I was a little bit surprised that he still had a cast on, without having it removed in this period of time. It was applied on the 28th of October. That is a little over five months, approximately five and a half months that he has had this cast on without having it off for any examination, [153] or any X-rays, and by looking at the X-rays through the cast, one would assume that the fracture has healed. You can't be certain that it is, for the simple reason that there are shadows of the cast on top of it.

But there is evidence of callous formation, and I would be of the opinion that the fracture is healed.

Q. Would you show us the pictures?

A. We will start up high. And this is the same as if you were looking at him from the front with

(Testimony of W. A. Bishop, Jr.)

his right side not being in the cast, his left side being encased in the cast.

The reason I show the pelvis is because it shows part of the skeleton in the cast, and part of it outside of the cast.

On this side you can see the head of the femur, or where it fits into the socket joint without the cast in front of it, and on the opposite side the cast is in front, and you can see what the shadow does to it.

I want to call your attention to the fact that there is what we call marked decalcification even of the opposite extremity. That happens in all individuals when they pass forty. It happens in some individuals more rapidly than others, and it [154] usually proceeds through life as long as a person lives.

And in connection with a discussion of decalcification, the less callous there is in the bone, as a general rule, the longer it takes that bone to heal.

This is the left femur or thigh bone taken from the front. You can see very well the cast, and you can see that there has been a wedging. The cast has been cut in two at this region, or something has happened to it, because you can see the cuts in it. You can see here, unfortunately, at one of the lines where the cast has been cut, this upper fracture. That is the one he has had the most trouble with.

Now, you can also see without any use of your imagination four, two below and two above, and due to the shadows of the cast, you can see them below the fracture site much easier, where those pins were inserted to hold the bone.

(Testimony of W. A. Bishop, Jr.)

Now, the apparatus consists of a pin. It is a little smaller than this pencil, but one would go in there, one here, and one here, and they would go on the outside with a bar, and by fastening them tightly together with these pins in the patient doesn't have to have the cast on.

You can see the fracture line. [155]

Now, there is another fracture down here which you can see. It is displaced probably an eighth of an inch, and you can see the slight offset in it there. It would be a little bit difficult through the cast to see this irregular fracture line that runs through there if it were not for this slight offset. That is taken from the front. That is the left thigh bone.

Then taking the same bone from the side, again through the cast, you can see one hole. You can't see all the holes, but there is one of the holes. There is a hole in both sides of the bone, and in this particular one you are catching both sides where you are looking straight through it.

And in the other holes, where the X-ray would be in such an angle that it would catch a hole on one side, you would not see through the hole on the other, and that accounts for the fact you do not see all of them.

In other words, the shadow doesn't show up unless there is a hole on both sides. The bone is kind of like a pipe. It is hollow, and if you are looking through it, and there is a hole on both sides, you can see through, which you can see by this hole here. But those holes have to be lined up with your

(Testimony of W. A. Bishop, Jr.)

sight, or with the X-rays, if the X-ray shows [156] through. So you can see that.

The fracture again is seen. Then there is a little bit of an offset here, as you can see. That offset is considered in excellent position, because the other way, looking at it from the front, it was exactly like this, with no offset from side to side. But when you look at it at the side, it is approximately three-quarters. Three-fourths is plenty adequate, and it is very seldom in a thigh bone we get better than that, as far as position is concerned.

Again down below, you can see what I meant when I talked about the shadows of the cast. You can see those shadows there. When they go across the bone it is pretty hard to see these fractures, but there is a slight offset there, and a slight offset here of an eighth of an inch. And you can see some irregularity that probably represents it. But the other fracture is there.

I took the tibia, or the bone below the knee, and we were unable to show any offset in any bone. Both of those are visualized well.

In this particular X-ray I can't see any variation from the normal, and in the X-ray of the tibia.

In the fibula it appears that there was a [157] fracture right here. There is a little bit of a misalignment there, and there is what appears to be a crack, and a little bit of enlargement of the bone. But that is in excellent alignment, and if there was a fracture there, I am sure it is healed to the extent that that would not be disabling.

(Testimony of W. A. Bishop, Jr.)

Again you can see that the bone is pretty much of a shell.

Of course, the normal bone X-ray for comparison, we don't have that, but here is the ankle joint. You can't see the cortex or outer shell of the bone in spots here, it is so thin.

Up here is another area where you cannot see it. And these black spots in here, ordinarily you see these little striations or lines. Those represent the inner structure of the bone, which I am sure most of you have seen in animals, in beef bones, and so forth.

So with reference to the chest, we took only one film. It didn't show anything to be abnormal. His heart is of the average size. These white spots, that is probably a healed tuberculous node. It is a calcified area, at any rate, in his chest.

He was supposed to have some fractures of the left ribs. This being the left side, we followed [158] all of these left ribs out, and if there was a fracture there, it is healed to the extent that it can't be shown.

That is entirely possible, however, because a fractured rib, if it is in position, and isn't displaced, would heal in this period of time to where you would have to have an X-ray just exactly right to show it.

After all, the ribs are curved, they form a curve around, and if the fracture was here, and the film, the X-ray was coming through at an angle like that you wouldn't show it. If you took several films,

(Testimony of W. A. Bishop, Jr.)

pointing them toward the edge all the way, if there had been a fracture, we could pick it up.

But he has no pain in his chest. There is no thickening of the lining of his chest. The lung fields are clear, and we did not take further X-rays.

With reference to his skull, I can't—if he had a fractured skull, it is healed. There is some question. There is a line—these little lines here are blood vessels which lie on the outer side of the brain, and instead of the space being in the brain for it, the space, half the space is in the skull, leaving markings.

In other words, if you looked inside the [159] skull, you could see the markings where all the blood vessels were.

These markings here are blood vessel marks. There is a marking there which might represent the residual of a healed fracture. Looking at it from the side there is a straight line across there which would be, possibly. These others are blood vessel markings, which are normal findings. And there are no other variations from the normal in his skull.

That constituted our X-ray findings.

Q. Does a metabolism favorable to the healing of bones in a man of the age of this man increase or decrease with immobility?

A. It decreases with immobility for the reason—And that is the reason why we try to use the type of treatment which will permit a patient up, for the reason that the circulation is more sluggish, and with sluggish circulation there is an accumulation of

(Testimony of W. A. Bishop, Jr.)

waste products in the blood, and notably carbon dioxide as being the active element.

In this instance, calcium is very soluble in the presence of carbon dioxide. It forms a carbonic acid of a weak solution in the blood, and any patient who has a sluggish circulation in an extremity will lose a lot of calcium. In fact, it is one of the things we run into with patients—Let us [160] get away from injuries completely. A patient who has poliomyelitis, and is badly involved, and lies immobile in bed, those patients lose extreme amounts of calcium from their bone. It comes into the blood first, and then through the kidneys, and those same patients have a tendency to develop kidney stones, and that is one of the big things we have in that type of patient, is because of the immobility.

We are using, for example, in polio, to illustrate how important it has come to be in our way of thinking, we are using so-called rocking beds, and anybody who has been around a hospital where they are treating many polio patients will see them on these rocking beds. That stimulates, or helps to stimulate the circulation, get the stagnant blood out of the extremities to the lungs to get rid of these products.

Q. Would this man be better off if he were upright?

A. In my opinion, he would be very much better off. He is in excellent physical condition, I would consider, for a man of 66 who has been in bed for

(Testimony of W. A. Bishop, Jr.)

a year, and has had one operation for multiple injuries. But if we had been treating him, we would have gotten him up one way or another, because they always do better when they are up. [161]

Q. What is your prognosis from your examination, of what could be done with him now?

A. Well, I think I could best answer that by telling you what I would do if it were turned over to me. In the first place, I would get the cast off.

If X-ray examination and feeling of the leg showed that there was still motion, which I don't believe there would be, but if there was motion, I would immediately do a bone graft operation. I would not put him back in a cast, but I would use other types of skeletal fixation.

And since World War II we have used, and it is used all over the world, they are now universally using intra-medullary nails. The medullary space is the space down the center of the pipe or long bone, and we slide these down the center, and it is rigid, and then a patient can be up.

It also permits him to keep the joints in the extremities limber, and, too, if there is absorption of the bone ends, which normally occurs in healing, it permits the bones to slide together and maintain good contact. And that is the main reason why most orthopedic surgeons in America do not like the type of pin fixation he had, because if it is rigid enough to hold the bones together, it is [162] also rigid enough to hold those bones apart. If there is some absorption and they do not have pressure

(Testimony of W. A. Bishop, Jr.)

contact, which has been proven to be necessary for healing of bones, and that has been proven by merely distracting or overpulling, and placing them with plates and other apparatus holding the bone ends apart, and they will not heal.

Even in children it has been proven, accidentally, of course—it was not done intentionally—but in dogs it can be done experimentally and produce non-union in that manner.

Q. How long would it be before you would get him out of bed if he were turned over to you?

A. If he were turned over to me, certainly by tomorrow. If he did not have to be operated on, I would have him out of bed in a wheelchair, at least, by tomorrow, and have him on crutches very soon thereafter. If I would have to have an operation, I would have him on crutches in at least two weeks.

Q. You said it appears to you from your examination you don't believe he would have to have an operation?

A. No, sir, I do not believe it would be necessary.
Mr. Wilson: You may examine. [163]

Cross-Examination

By Mr. Raineri:

Q. Doctor, you testified you heard of Dr. Knowles? A. Yes, sir.

Q. And he is supposed to be an eminent orthopedist, isn't that right?

(Testimony of W. A. Bishop, Jr.)

A. Dr. Knowles is one of the oldtime orthopedists.

Q. He is well-known in his field, isn't that right?

A. Well, probably no better known than most of the other orthopedists around the country.

Q. You have heard of him, anyway?

A. Yes, sir, I have heard of him.

Q. You know he is the man that has been taking care of Mr. Gossnell back in Iowa?

A. Yes, sir.

Q. All doctors don't agree, do they—I mean, orthopedists don't agree as to what is the best method of treating a patient? You might, as an orthopedist, think one method was the best, and another doctor might think that another method was the best, isn't that right?

A. That is right.

Q. And if Dr. Hartman so testified on the stand here in court this morning and made that [164] same statement, he would be correct, isn't that right? A. That is right.

Q. Now, in taking the history from Mr. Gossnell, did you learn from him whether he had had an embolism or not?

A. It came out. He told me that he had had an embolism, but we didn't go into the degree of his illness, how it was diagnosed, and so forth.

Q. Well, now, when there is an embolism, there is always danger in performing an operation, isn't that right?

A. When there is an embolism—in fact, there

(Testimony of W. A. Bishop, Jr.)

are a number of kinds of embolisms, and unless we know for sure, we can't very well discuss it. There are fatty embolisms which a patient most likely would have early, because he has no evidence of an embolism of the type that would result from the breaking loose of a clot elsewhere, and lodging in his lungs.

Maybe we better describe an embolism. By embolism we mean something circulating in the blood which lodges elsewhere. After it lodges, it is called an embolism. Patients who have fracture can have so-called fat embolism. All of you have seen the marrow of bone, and you have seen how much fat there is in it.

Sometimes in breaking one of those bones, [165] there is a vessel which is left open, because it is attached to the bone, and this fat will get into the vessel and get into the circulation. The emboli can lie in the lungs and make a condition that simulates pneumonia, or lodge in the brain, which will give a condition which temporarily resembles a stroke.

The other type of embolism is where a clot forms in a vessel and subsequently breaks loose, and that of course invariably lodges in the lungs, provided that the heart is normal.

In some hearts the blood can pass through, but he has no murmur, and no findings that would indicate that there is any short circuit in his heart.

Q. Well, if there is a history of an embolism in a case, it is dangerous to operate, isn't it?

A. Not necessarily. There is treatment for fatty

(Testimony of W. A. Bishop, Jr.)

embolism. There is treatment for embolism originating in the veins, and certainly you can operate in either instance within two or three weeks.

Q. But I say, there is the danger of death resulting where there is embolism in the picture, isn't there?

A. There is danger of death at any time that embolism exists. [166]

Q. Now, if his doctors back there, and Dr. Hartman here testified, and they were his attending physicians, and they were familiar with his condition, testified or stated that in their opinion that it wouldn't have been safe here to operate on him because of this danger of the after-results from an embolism, why, they would be taking the correct precautionary measures, isn't that right?

A. All I can say is we have never found it necessary to delay an operation more than two or three weeks when an embolism had existed.

Q. You mean you would take a chance regardless of the outcome?

A. We have never been sorry that we did perform surgery under such circumstances by treating the patient prior to and following the operation for the thing which caused the embolism.

Q. But that is a medical precaution, that some doctors do that, is that correct? A. Yes, sir.

Q. Now, when you said that you would remove the cast and try to get the man up on his feet, that is what essentially Dr. Knowles tried to do last May when he got back to Fort Dodge? He removed

(Testimony of W. A. Bishop, Jr.)

the cast and tried to get the man up, isn't that right?

A. From what the patient said, there was [167] not too great an effort to get him up, because he said he was actually up only two or three times a day for very short periods.

Q. The cast was off, though, from May until October, isn't that right?

A. I believe it was the 11th of May until the 25th of October.

Q. Yes. And after all that period of time, it was found that there was not progressive healing, or I mean that this bending took place, and it was necessary to put the cast back on? Isn't that the history you got? A. Yes, sir.

Q. Now, you say that you would remove the cast and determine if there was motion. What do you mean by that?

A. At any time that we remove a cast from a patient like this, we would take new X-rays also, and we would satisfy ourselves that there was no motion at the fracture, and that there was healing, by X-ray, and knowing that, we would use very persuasive methods, if we had to, to get the patient up.

Q. In other words, then, what you meant by motion is that you would try to determine whether that fracture was healed, or not, is that right? [168]

A. That would be a precautionary measure that any orthopedic surgeon I am sure would take.

Q. If there was no proper motion there, or if the motion was not satisfactory, you would have a

(Testimony of W. A. Bishop, Jr.)

bending like you had last October again, isn't that right?

A. If it isn't united, he could have bending, sure.

Mr. Raineri: That is all.

Redirect Examination

By Mr. Wilson:

Q. You know Dr. Pohle?

A. Yes, sir, I do.

Q. Does he have a reputation in medical circles of being an orthopedist, or an orthopedic surgeon?

A. I don't believe he contends to be. No, sir, he does not.

Q. Doctor, if it were shown to you that Dr. Hartman's bill for his attention to this man was \$75.00, and Dr. Pohle's bill, including his stay in Dr. Pohle's hospital, was \$2,752.00, would you think he was under Dr. Hartman's care or Dr. Pohle's care?

A. I would think he was under Dr. Pohle's care.

Q. Dr. Hartman testified he saw him three [169] times. Doctor, have you ever seen me? Do you know me at all?

A. I don't believe if I met you on the street—I think I have—we have been to a meeting or someplace together. I wouldn't know for sure where it was.

Q. I had no conversation with you with regard to this matter prior to your coming here today?

A. No, sir.

(Testimony of W. A. Bishop, Jr.)

Q. And, in your opinion, the condition of Mr. Gossnell is that there is excellent alignment?

A. Yes, sir.

Q. And that the healing, in your opinion, is probable?

A. Yes, sir. I think it is most likely, from the films, that it is uniting.

Mr. Wilson: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Wilson: I call Mr. Carroll. [170]

SIMEON J. CARROLL

called as a witness in behalf of defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Simeon J. Carroll.

Q. Are you one of the defendants in this case?

A. Yes, sir, I am.

Q. Are you an employee of Siebrand Brothers Circus and Carnival?

A. No, sir.

Q. Have you ever been?

A. No, sir, I haven't.

Q. Are you an employee of Pete Siebrand?

A. No, sir, I am not.

Q. Have you ever been?

A. Never have been.

(Testimony of Simeon J. Carroll.)

Q. Are you an employee of Hiko Siebrand?

A. No, I am not.

Q. Have you ever been? A. Never been.

Q. You have been here during the conversation and the discussion of this case, and heard the witnesses? A. Yes, sir. [171]

Q. Did you drive a truck belonging to Pete and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, on the day that this accident occurred? A. Yes, sir, I did.

Q. Did you on that day have a chauffeur's license? A. No, sir, I didn't.

Q. Where did you reside at that time? Where did you live?

A. You mean my home? It is in Georgia.

Q. And what kind of a truck was this that you drove? A. It was a pick-up.

Q. Did you drive it for Pete Siebrand?

A. No, sir.

Q. Did you drive it for Hiko Siebrand?

A. No, sir.

Q. Did you drive it for Pete and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival? A. No, sir, I did not.

Q. Who did you drive it for?

A. I drove it for Bill Siebrand.

Q. Did you have the consent of Pete Siebrand to drive that truck? [172]

A. No, sir, I didn't.

Q. Did you have the consent of Hiko Siebrand

(Testimony of Simeon J. Carroll.)

to drive that truck? A. No, sir.

Q. Did you have the consent of any employee or agent of theirs, to your knowledge, who had such authority as to be able to give you such consent? A. No, sir.

Q. Did you have the consent of anybody, whether you had authority or not?

A. You get me confused. I had permission to drive the truck, but I got the wrong truck.

Q. You had permission to drive a truck, but you got the wrong truck? A. Yes, sir.

Q. Would you tell the court and jury about that?

A. Well, the day before, why, Bill Siebrand asked me if I would take his truck and trailer over for him, and I said that I would. And I went out the next morning to hook it up and take it over, and that was when the accident occurred.

Q. Was there anybody in the lot at the time? Was Pete Siebrand at the lot?

A. No, sir. [173]

Q. When you hooked up the truck, or when you left? A. No, sir.

Q. Was Hiko Siebrand there when you left?

A. No, sir.

Q. Or when you hooked it up? A. No, sir.

Q. Where did you hook it up?

A. 2307 East Van Buren.

Q. Is that the Siebrand's regular winter quarters lot? A. Yes, sir.

(Testimony of Simeon J. Carroll.)

Q. Have you been at all acquainted with the Siebrands to know them?

A. Yes, sir, I know them.

Q. How long do you know them?

A. Since 1948.

Q. And have you ever been on their show in any way? A. Yes, sir.

Q. And what is your business in connection with shows, if any?

A. I am a concessionnaire.

Q. And when you went out to pick up this trailer and hook it onto—what kind of a truck did you hook it onto? [174]

A. It was a pick-up.

Q. What? A. A pick-up.

Q. And had Bill Siebrand told you what kind of a truck to hook it onto?

A. He just said his red pick-up, is all. Take his red pick-up and trailer over.

Q. Did you take it with the red pick-up?

A. Yes, sir, I did.

Q. And where was the red pick-up that you took it with when you encountered it?

A. Well, it was on this side of the trailer. Is that what you want, the location?

Q. Was it on this lot? A. Yes, sir.

Q. And is the lot fenced?

A. No, sir. Pardon me, sir, I think it is fenced on some sides.

Q. But there is a gate on one side to get into?

A. The front isn't fenced.

(Testimony of Simeon J. Carroll.)

Q. That is the Van Buren Street side?

A. That is right.

Q. Where did you get the keys for this truck?

A. It was in the truck.

Q. Have you had any experience with pulling a trailer? [175]

A. Yes, I have had a couple of trailers myself.

Q. And did you hitch this trailer onto this truck yourself? A. Yes, sir, I did.

Q. And did you examine the hitch before you put it on?

A. Well, I tried to examine everything. I examined the hitch and ball, and looked at the tires.

Q. By the hitch and ball, what do you mean by that?

A. Well, it is on the truck. The hitch goes on over.

Q. Mr. Carroll, I hand you an object here which looks slightly like a ball. Does this resemble the ball that you refer to? A. It is a ball.

Mr. Mahoney: Better mark it.

Mr. Wilson: Have it marked for Mr. Mahoney.

Could we at this time offer the X-rays from which the doctor testified?

Mr. Raineri: No objection.

Mr. Mahoney: No objection.

Mr. Wilson: We would like to offer them in evidence.

The Clerk: Defendants' Exhibit A in [176] evidence.

(Testimony of Simeon J. Carroll.)

(Said X-rays were received in evidence and marked Defendants' Exhibit A.)

The Clerk: Defendants' Exhibit B for identification.

(Said object was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit B for identification, and is that what you would ordinarily term a part of a trailer hitch?

A. Well, I guess you would, although it is not a trailer hitch itself. This goes on the——

Q. Where does that part go, as a rule?

A. On the vehicle that is pulling it.

Q. Was there one on this vehicle similar to that?

A. Yes, there was.

Q. And in what position does it fit on the vehicle? A. Like this (indicating).

Q. Upright? A. Yes, sir.

Q. Then what you term the trailer hitch is on the truck? I mean, on the trailer, is that what you mean, is that correct? [177]

What you term the trailer hitch is on the trailer, and it hitches onto this, is that correct?

A. Yes, sir.

Mr. Wilson: May this be marked as Defendants' Exhibit C for identification?

The Clerk: Defendants' Exhibit C for identification.

(Said object was marked as Defendants' Exhibit C for identification.)

(Testimony of Simeon J. Carroll.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit C for identification, and ask you if you know what this is?

A. That is a hitch, too, sir.

Q. This is a trailer hitch also?

A. Yes, sir.

Q. And it has a ball in it, is that correct?

A. Yes, sir.

Q. Now, I hand you Defendants' Exhibit D for identification, and ask you if you know what this is?

A. That is a trailer hitch, too.

Q. Are these two hitches familiar to you, this type of hitch?

A. Yes, sir, but I think this first one you showed me is for a light trailer, or something. [178]

Q. This one? A. Yes, sir.

Q. For what? A. A light trailer.

Q. Now, are these common trailer hitches?

A. Yes, they are.

Q. Was either one of this type of trailer hitch used on this trailer?

A. Yes, sir.

Q. Which one? A. The one on the right.

Q. The one on the right which I have referred to as Defendants' Exhibit D?

A. That is right, sir.

Q. You have examined it. You are familiar with it?

A. Yes, sir.

Q. This is the kind of a trailer hitch that was on this trailer on that day?

A. Well, to all appearance, yes, sir, it is the same type. I couldn't exactly say it was the same,

(Testimony of Simeon J. Carroll.)

manufactured by the same people, if that is what you mean.

Q. This Exhibit C for identification is not the type that was on there?

A. Definitely not. [179]

Q. You notice there is a wheel on the top of C, and there is not a wheel on top of D?

A. Yes, sir.

Mr. Wilson: I offer Exhibit D in evidence as an example of the hitch that was used.

Mr. Raineri: May I ask the witness some questions on voir dire?

The Court: All right, go ahead.

Q. (By Mr. Raineri): You only saw that trailer that one time, that trailer hitch that one time, is that right? A. You are right, sir.

Q. And you haven't seen it since?

A. Well, I have seen it since but they was taking it off and putting a new one on.

Q. I mean, you don't know? That was the only time you saw it, was that one day?

A. It was the only time I had occasion. I might have just glanced at it, or something, but it was the only time I had the opportunity of coming in contact with it.

Q. You are not a regular truck driver, are you?

A. No, I am not.

Q. You are a concessionnaire?

A. Yes, sir.

Q. And in fact, you are not too familiar [180] with the work of a truck driver, or an employee

(Testimony of Simeon J. Carroll.)

that would pull a trailer? You are not familiar with it?

A. Well, I pull trailers. I own a trailer myself.

Q. That is not in your regular line of work?

A. You mean truck driver?

Q. Yes. A. No, sir.

Q. So that you are probably familiar with a trailer and truck that you owned at one time, but I mean generally you haven't had experience with that type of work, or with trailers, or the hitches that are used on them, and so forth, are you?

A. Well, this was the same type of hitch I had on my trailer.

Q. You haven't examined it since that time? You only saw it that one time?

A. To come in contact with it, yes, sir.

Q. And here when you were being questioned here on direct examination, I took down your answer to one or two questions, and you said, "To all appearances it could be the type that was used."

Now, you are not sure of that? When you say "To all appearances," that means you are not positive as to what type it was, isn't that right? [181]

A. I am sure it is the same appearance, yes, but the same, identically, I can't say it was manufactured by the same people, because I don't know.

Mr. Raineri: That is all.

Mr. Wilson: I offer it.

Mr. Raineri: No objection.

Mr. Mahoney: No objection.

(Testimony of Simeon J. Carroll.)

The Clerk: Defendants' Exhibit D in evidence.

(Said object was received in evidence and marked Defendants' Exhibit D.)

Q. (By Mr. Wilson): Mr. Carroll, where does the tongue, or whatever it is, go on to this hitch, or where does the hitch go on to the tongue?

A. To the trailer?

Q. Yes.

A. Well, like the trailer would be this way (indicating).

Q. And do they use a single tongue coming in, or do they use two tongues? What would be the type on those, if you know?

A. It comes to a "V."

Q. You note the drawing made by the officer. Is that the type that was on the trailer? [182]

A. Yes, it is. The only thing, he doesn't show this thing solid here, the way it should be.

Q. I don't know, but I took this to be the tongue, and the hitch to be on the end of it.

Did you hear him testify about a hole?

A. Yes, sir.

Q. In this thing that had not been broken?

A. I certainly did.

Q. And that had threads in it?

A. I certainly did.

Q. Now, would you step over here, Mr. Carroll.

Take that ball, and see that the ball is on the truck. I will be the truck. Fasten this trailer on here, will you please?

(Testimony of Simeon J. Carroll.)

A. (Witness complies.)

Q. Is it fastened onto the truck now?

A. Yes, sir.

Q. And you can turn the trailer? And you can't get it off, is that correct? A. Yes.

Q. You know what this hole is for?

A. Yes, sir.

Q. In this position, is this all here, as far as the hitch is concerned? What holds it on the truck? Is it all there? A. Yes, sir. [183]

Q. Nothing missing? A. No.

Q. Nothing out, nothing gone, nothing anywhere else?

Mr. Mahoney: I object to this leading, your Honor.

The Witness: No, there is nothing missing.

Mr. Wilson: All right. Excuse me.

Mr. Mahoney: That is all right.

Mr. Wilson: That is all right. I will let you lead him a while.

Q. (By Mr. Wilson): Now, do you think this is the hole that the officer referred to?

A. I know it has to be.

Q. Would you know what that hole is for?

A. I certainly do.

Mr. Wilson: May this be marked Defendants' Exhibit E for identification?

The Clerk: Defendants' Exhibit E for identification.

(Said object was marked as Defendants' Exhibit E for identification.)

(Testimony of Simeon J. Carroll.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit E for [184] identification, and ask you if you know what this is?

A. That is a jack handle.

Q. A jack handle?

A. It is for the trailer, when it is not connected up to any vehicle, to raise or lower the front end.

Q. You tried to put this in there?

A. No, sir.

Q. It is for the trailer when it is not connected with the vehicle? A. Yes, sir.

Q. Would you put this in the hitch and show the jury where it goes?

A. Yes, sir. (Demonstrates.)

Q. At the time that you and this officer met each other over there on that bridge, this was not in here? A. No, it was not.

Q. Go ahead, put it in. This goes down for what purpose, now?

A. To hold the front end of the trailer up.

Q. And when it is parked? A. Yes.

Q. And this extends clear on down to keep the trailer tongue level, is that correct? [185]

A. Yes, sir.

Q. And you can screw it right on down through there, could you, if I could hold it?

A. Yes. It is tight now.

Q. All right, now, it will go clear on up to here, is that right? A. Yes.

Q. Now, will you disengage this trailer hitch from the truck?

(Testimony of Simeon J. Carroll.)

A. (Witness demonstrates.)

Q. Now, put it back on the truck.

A. (Witness demonstrates as requested.)

Q. It is on there now? A. Yes, it is.

Mr. Wilson: Now I will show it to the jury.

If you will take hold of that, I will let it out for you.

Q. (By Mr. Wilson): This is an ordinary type of trailer hitch?

A. That is the kind that was on there, yes.

Q. Is it the common type, is it in common use?

A. I think it is the mostly widely used.

Q. For what kind of trailers?

A. Light trailers, house trailers, such as that.

Q. You notice a hole through here, Mr. [186] Carroll? A. Yes, sir.

Q. And what is that for?

A. That is for a safety lock.

Q. You put a pin through there, or something?

A. Yes, sir.

Q. I believe you said that you inspected the ball and the trailer hitch, and put the two of them together, and the truck was Mr. Pete Siebrand's, and—— A. Would you repeat that?

Q. I say, the ball was on Pete and Hiko's truck, and the hitch, the trailer hitch was on Bill Siebrand's trailer, is that correct?

A. That is right, sir.

Q. Now, how big was the trailer?

A. Twenty-four feet.

Q. Twenty-four feet? A. Feet, yes, sir.

(Testimony of Simeon J. Carroll.)

Q. Is that the length? A. Yes, sir.

Q. A standard highway width, is that correct?

A. Yes, sir.

Q. What was the purpose of it?

A. Concession.

Q. To operate a concession?

A. That is right, yes, sir.

Q. And it belonged to Bill Siebrand, as far [187] as you know? A. Yes, sir.

Q. Now, I believe you stated Bill asked you to take it over there? A. He did, sir.

Q. If you weren't a truck driver, do you know why he asked you to take it over there?

A. Well, I guess maybe he had something else to do.

Q. Had you contemplated any association with Bill Siebrand? A. Yes, sir.

Q. What?

A. Well, I was going to operate the bird store.

Q. Speak a little louder.

A. I was going to operate the bird store for him.

Q. You were going to operate a bird store for him? A. Yes, sir.

Q. Where were you going to operate it, on what kind of a thing? A. In Mesa.

Q. Was it in connection with a theater or show?

A. It was going to be on Siebrand's shows. [188]

Q. Going to be on the Siebrand shows?

A. Yes, sir.

Q. And did you have an interest in the trailer?

(Testimony of Simeon J. Carroll.)

A. You mean did I own part of it, or something?

Q. Yes. A. No, sir.

Q. Did you have a deal with him, or did you contemplate having a deal with him?

A. We were talking about I was going to operate the bird store for him, yes.

Q. What is a bird store?

A. It is a concession.

Q. What is a concession?

A. It is different games, you know, merchandise.

Q. What kind of birds?

A. Well, I had parakeets and canaries and finches.

Q. And did you work for Bill Siebrand?

A. No, sir.

Q. Did you intend to work for Bill Siebrand?

A. Well, I was going to operate that store for him.

Q. On what basis? A. Commission.

Q. Like what?

A. Well, that is the way always concessions [189] operate. They operate on commission.

Q. What kind of deal did you think you were going to work out with him?

A. Well, there was talk that I get 50 per cent, and he get 50 per cent after expenses.

Q. And where was Bill Siebrand on the day you went out and hitched his trailer onto the wrong truck? A. That I don't know.

Q. Did you see him later that day?

(Testimony of Simeon J. Carroll.)

A. Yes.

Q. Where did you see him? A. In Mesa.

Q. And was the Siebrand show in operation in Mesa at the time of the accident? A. No, sir.

Q. Had the Siebrand show been in operation anywhere in 1953?

A. No, sir, not that I know of.

Q. Had this bird store concession trailer been in operation anywhere in 1953, that you know of?

A. No, sir.

Q. What was in the trailer? Excuse me. I think I asked you how long it was and how wide it was. What was the nature of it? What was it made of?

A. You mean the body? [190]

Q. Yes. A. Aluminum.

Q. Aluminum? A. Yes, sir.

Q. Was it reinforced in any way?

A. You mean, was there something over the aluminum, you mean, or what?

Q. Well, over it or under it?

A. It had a frame, sure.

Q. What was it made of?

A. Sir, I couldn't tell you that. It was metal, but I didn't—

Q. Did you examine the contents of the trailer?

A. Do you mean do I know what was in it?

Q. Yes. A. Yes, sir, I do.

Q. Whose property was in it?

A. Bill Siebrand's.

Q. Was any of it yours?

A. No, it was not.

(Testimony of Simeon J. Carroll.)

Q. Any of it Hiko or Pete's?

A. No, it was not.

Q. Any of it belong to Siebrand Brothers Circus and Carnival, operated by Hiko or Pete?

A. No, it was not.

Q. What was in it? [191]

A. Just a bird cage and different frames for the concession.

Q. What kind of bird cage?

A. It is what you use to keep the birds in, an aviary.

Q. An aviary? A. Yes.

Q. How big is it?

A. You don't mind if I think a minute, do you? I think it is about six feet tall, and it is about fourteen feet long.

Q. And what is it made out of? A. Wire.

Q. Were there any birds in it? A. No, sir.

Q. What else, if anything, was in the trailer?

A. Well, there was nothing else, so far as weight was concerned.

Q. Anything on the walls in there?

A. Yes, there was a mirror. There was a mirror back of the aviary, you know, to reflect the birds back out.

Q. You heard this policeman say that he looked into the trailer, and it was filled with rides and concessions, is that correct? A. No, sir. [192]

Q. Did you hear him say that?

A. Yes, sir, I did. The trailer itself is a concession. There was no rides whatsoever in it.

(Testimony of Simeon J. Carroll.)

Q. It didn't have any concessions in it, did it?

A. Only the trailer itself, is all it was, a concession.

Q. The trailer itself is operated as a concession when you get to where you are going?

A. Yes, sir.

Q. How is that accomplished? How do you make a concession out of it from a trailer?

A. Well, the sides of it open up, you know, just open straight up and out and make like awnings. You have seen tents that opened up and make a concession. Well, the side of this trailer opened up and made awnings, and the concession was inside.

Q. And the bird cage was inside?

A. Inside of there, yes, sir.

Q. Now, did you go into business with Bill Siebrand, or anything of that sort, on the day of the accident?

A. If I understand the word partner, I never was partners with him, and I was not in business with him, because we hadn't even started.

Q. Did you operate the bird concession, the bird cage concession in the next five or six days or [193] so?

A. It was in the last of the week, over in Mesa, when we got started, because we didn't have any birds.

Q. Did you have a deal with Bill Siebrand on the day you were going to Mesa to operate the thing?

A. We had no definite deal, but we were talking.

(Testimony of Simeon J. Carroll.)

Q. What time did you see Bill at Mesa?

A. Well, I can't tell you the truth exactly what time it was, because that was the day of the accident.

Q. Did you buy the birds?

A. No, sir, I didn't.

Q. Who bought the birds?

A. Bill Siebrand.

Q. And you say the birds didn't come?

A. No, sir.

Q. Do you know where they were bought?

A. Well, it was a friend of his was supposed to bring them. She was visiting, and supposed to be bringing them from California. I don't know what happened. They were late coming in.

Q. Eventually, later you did go into a deal with Bill Siebrand on operating a concession for him?

A. Yes, sir.

Q. In this trailer? [194] A. Yes, sir.

Q. And was it this concession, then, the concession that you went into, or you were talking about before the accident?

A. Well, we changed it around several times after we even got it opened.

Q. Then you did make a deal with him after the accident? A. You mean a definite deal?

Q. Toward the last of the week? A. Yes.

Q. This was on Friday that the accident occurred? A. Yes, sir.

Q. Now, do you recall the officer testifying he gave you a ticket because there were no safety chains on the truck? A. I do, yes, sir.

(Testimony of Simeon J. Carroll.)

Q. He said that you heard him say that.

A. Yes, sir.

Q. And at the time you got the ticket, do you know what it said?

A. Do you mean do I know just exactly what it said on there?

Q. What did he charge you with?

A. To tell the truth, sir, I don't just [195] exactly remember.

Q. What became of it?

A. I guess they have it over there. I don't know.

Q. Did you have a trial, or anything of that sort?

A. No, I put up a ten-dollar bond.

Q. A ten-dollar bond? A. Yes, sir.

Q. You heard the officer say that he asked you what your occupation was, and you said truck driver for Siebrand, or some such thing as that. Do you recall his saying that from the stand here?

A. You are talking about here?

Q. What did happen over there with regard to that? Tell us that.

A. You mean when the trailer broke loose?

Q. Let me ask you again. A. Yes.

Q. From the stand here you heard the officer say that he asked you what your occupation was, and you said, "I am a truck driver for Siebrand's," or something like that? Something to that effect?

A. Yes, sir.

Q. You heard him say that?

A. Yes, sir. [196]

Q. Is that true?

(Testimony of Simeon J. Carroll.)

A. Yes, he said it right here.

Q. Now, is it true? A. No. I am not.

Q. Did you have any conversation with the officer about your occupation? A. Yes, sir.

Q. What was said by you, and what was said by him? Excuse me. Where did it take place?

A. On the bridge at Tempe.

Q. Near the accident? A. Yes, sir.

Q. And do you know of anybody else that was listening beside you and him?

A. No, sir, I don't.

Q. What was said by each of you?

A. Well, to start with, after the accident, and we started to getting traffic away, why, I went up to him and introduced myself, and I told him that I was the driver, and what should I do?

And he said to take the pick-up and get it off of the bridge, and to come back. So then I came back, and he asked me if I had a driver's license, and I told him no.

Q. I can't hear you very well.

A. He asked me if I had a driver's license, [197] and I told him no. And he asked me was I with the show, and I told him yes.

Q. He asked you if you were with the show? Is that what you said? A. Yes, sir.

Mr. Raineri: Speak a little louder. You answered yes? Your answer was yes?

The Witness: My answer was yes.

Mr. Raineri: When he asked you if you were with the show?

(Testimony of Simeon J. Carroll.)

The Witness: Yes. And he asked me what I did, and I told him I was a concessionnaire.

Then after I come back, then they had taken the trailer and put it across the street over there, so we went over and looked at the trailer. And the first thing then I discovered that the hitch was broken, and I told him the hitch was broken.

And so then we started to look for it to see if we could find some piece that was missing, you know, and he didn't look very hard, it didn't seem to me like he did.

Q. (By Mr. Wilson): Did you go with him?

A. Yes, sir.

Q. Where did you go?

A. Just on the bridge. [198]

Q. Just on the bridge? A. Yes.

Q. Go ahead.

A. I guess that was about all. He gave me a ticket.

Q. Did he tell you he had been following you?

A. Oh, yes, sir. Yes, sir, he did.

Q. Did you have a driver's license of any kind?

A. No, sir. I had an operator's license, but I didn't have it with me.

Q. Was it a chauffeur's license?

A. No, sir.

Q. Do you know what happened to the trailer hitch? A. Well, it broke loose.

Q. Did you have any unusual occurrence on the way over with the trailer and the truck other than this? A. No, sir.

(Testimony of Simeon J. Carroll.)

Q. You heard him testify you were going about 25 miles an hour?

A. That was not what he told me when the accident happened. He told me I was going twenty. That is one thing I definitely remember, yes, sir.

Q. What had been your rate of speed at [199] other times on the way?

A. I tried to drive very careful, the same way.

Q. You didn't encounter any difficulty of any kind? A. No, sir.

Q. Was there any indication to you that there was anything wrong with the trailer hitch on the way over there? A. No, sir.

Q. Did you notice anything occurred just before the accident that could have caused the trailer hitch to come apart, or break, or fail?

A. No, I do not, I did not.

Q. Tell us how you were going, how you were riding along? Tell us what happened?

A. All of a sudden I just looked in the rear view mirror, and I seen the trailer going across the highway. So that was just all there was to it, just like that, and I stopped, naturally.

I went over and it looked like these people's car was getting on fire, and I tried to get somebody to get them out. That was the first thing I was interested in.

Q. Did you do anything that could be termed as negligent or careless, or reckless?

A. No, sir, I did not. [200]

(Testimony of Simeon J. Carroll.)

Q. On the way over there, or at the time of the accident? A. No, sir.

Q. You said you inspected the ball and the hitch, both, before you put them on? A. I did.

Q. Did you fail to do anything, as far as you know, that would have prevented the accident?

A. No, sir.

Q. Of course, you didn't know the Gossnells at all? A. No, sir, I didn't.

Q. The officer said he thought that Gossnell was dead. Did you think he was badly injured?

A. Well, I was scared, if you want to know the truth.

When I seen the accident, and the car was smoking, and the man and lady were inside the car, and there was people gathered around the car, just like that, and they were all standing there, and I wanted to get the man out of the car.

That was my first thought, was to get him out. Then when we got him out was when I seen the officer, after we got the man out of the car.

That is why I was surprised when he said he was behind me, because he told me at that [201] time he was radioing for an ambulance.

Q. Did you see any of the Siebrands before you left the scene of the accident?

A. Yes, sir.

Q. Which one, if any?

A. Peter Siebrand.

Q. Is that this one by me? A. No, sir.

Q. Which one is that?

(Testimony of Simeon J. Carroll.)

A. That is his son.

Q. His son? A. Yes, sir.

Q. Is he called "Little Pete"? A. Yes, sir.

Q. And about when did he come upon the scene of the accident, or when did you first encounter him after the occurrence of the accident?

A. You mean the time?

Q. Yes.

A. I can't be definite in it, but I would say about ten minutes.

Q. And was he travelling with you in any way?

A. No, sir.

Q. What kind of a vehicle was he in, if you know? A. I don't even know. [202]

Q. Did you see him later that day? I don't mean later that day; I mean later at the accident; did you see the vehicle he was in?

A. No, sir; I don't think I ever did.

Q. Did you have any conversation with Peter Siebrand, meaning Little Pete, at that time?

A. Yes, sir.

Q. Was anybody else present within hearing?

A. There was a crowd around there, yes.

Q. As far as you know, could you name anybody that could have heard? A. No.

Q. Was he on the ground, or where was he?

A. He was on the bridge.

Q. What was said between you?

Mr. Raineri: I will object to that, your Honor, anything that was said between him and Peter,

(Testimony of Simeon J. Carroll.)

Junior. That is hearsay, and it might be self-serving, and everything else.

The Court: Sustained.

Q. (By Mr. Wilson): As the result of any conversation that you had with Peter Siebrand, did he help you? A. Yes, sir.

Q. What did he do?

A. I asked him if he got it all straightened [203] out, if he would take it on in, because I was nervous.

Q. You mean the trailer and truck?

A. Yes, sir.

Q. And did he? A. Yes, sir.

Q. And how did you go to Mesa, if at all?

A. I rode with him.

Q. And what did he drive?

A. He drove the pick-up, the trailer.

Q. And pulled the trailer?

A. That is right.

Q. Did you repair the trailer before you went?

A. Yes, sir.

Q. The trailer hitch, I mean?

A. Yes, sir.

Q. Was the officer present at any of that time?

A. You mean—I don't know just what you mean.

Q. When you were repairing the trailer and getting ready to go? A. No, sir.

Q. When did you first learn that you had gotten the wrong truck?

A. When Little Peter came in on the bridge.

(Testimony of Simeon J. Carroll.)

The Court: We will have our afternoon recess at this time. [204]

Keep in mind the Court's admonition.

(A short recess was had.)

The Court: You may proceed.

Q. (By Mr. Wilson): Had you been with Siebrand shows before? A. Yes, sir.

Q. And what did you mean by that expression?

A. Well, I was on the show.

Q. How? How were you on the show?

A. I was working on the show.

Q. How? A. I was working concessions.

Q. On salary? A. No, no salary.

Q. How did you get paid?

A. Commission.

Q. Who paid you?

A. The party you work for.

Q. Who did you work for?

A. Well, most of the time I was working for myself. I did a concession of my own.

Q. How many other years had you been on Siebrand's show?

A. The first time I was on the show was in 1948.

Q. And had you been on there after 1948? [205]

A. Yes. I was up in Alaska for a couple of years. Then I was back on his show.

Q. Now, how long have you been a concessionaire?

A. Well, the first show I was on was in 1948.

Q. And does a concessionnaire have a contract

(Testimony of Simeon J. Carroll.)

with the circus or the carnival that he is connected with? A. I have never seen one.

Q. And what was the usual deal? What is the deal that you had made when you were on this show for yourself?

Mr. Raineri: I will object to that, your Honor, back in 1948. That is so remote that it has no bearing here on the issues involved here.

The Court: It probably wouldn't have.

Mr. Wilson: I am sorry. I couldn't hear you.

The Court: It probably wouldn't have that far back.

Q. (By Mr. Wilson): When was the last time you were on this show prior to the accident?

A. I don't know if I can tell you the exact date, but it was in 1952.

Q. The season of 1952?

A. Yes, sir, the latter part of the season. [206]

Q. Did you have your own concession, or did you work for Bill?

A. No, I had my own concession.

Q. You never worked for Bill before?

A. No, sir.

Q. Did you rent space from Pete and Hiko?

A. Yes, sir.

Q. How did you pay for the space?

A. Well, it is different in different fairs, what we call the fairs, and still dates, and different towns is different prices.

Q. Well, approximately?

A. It would be so much a foot, and you give up

(Testimony of Simeon J. Carroll.)

a per cent of what you gross, like, say, for instance, that your concession was ten feet. Then you would pay for the ten-foot, say, \$2.00 a foot, or whatever it was, and then a per cent.

Q. How often did you pay the \$2.00?

A. Well, you have to pay it every week.

Q. Every week? A. Yes, sir.

Q. How often did you pay the per cent?

A. Every week.

Q. And what was the per cent?

A. Twenty-five.

Q. And did you pay any rent? [207]

A. That was rent. That was what you paid.

Q. Did they participate in your show in any way whatsoever? A. No, sir.

Q. In the operation of the show?

A. You mean my concession?

Q. Yes. A. No, sir.

Q. And did they participate in the losses, if you had a bad week?

A. No. You still had to pay your footage, but if it was a bad week, you didn't pay your percentage, because you didn't have no percentage.

Q. Did they participate in the profits?

A. Well, yes. As I said, you give them a per cent, yes.

Q. You said that was of the gross, not of the profits? A. Yes, of the gross.

Q. All of the money you took in, you paid this rent of 25 per cent? A. Over a footage, yes.

Mr. Raineri: I object. He put that word right

(Testimony of Simeon J. Carroll.)

in his mouth. He said profits before. Now he is trying to get him to say rent.

Mr. Wilson: Let us have the reporter read [208] where he said it was rent, and not I.

The Court: Start over again.

Mr. Wilson: Excuse me, Judge.

Q. (By Mr. Wilson): You now make your living as a concessionnaire, is that right?

A. Yes, sir.

Q. Did you show any interest in these people after the accident?

A. Well, I was very much concerned, yes.

Q. Did you do anything for them, or inquire about it?

A. I didn't sleep for one night, if you call that worrying about it.

Q. Did you do anything about it?

A. I went out to Tempe Hospital, yes, sir.

Q. When was that?

A. You mean the exact date?

Q. Yes, approximately.

A. Well, the only way I can tell you the exact date is it was the day I went over to Tempe, and then went out to the hospital.

Q. What did you go to Tempe for?

A. The police station.

Q. What for? A. For this accident. [209]

Q. Then you went to the hospital?

A. Yes, sir.

Q. Who was with you?

A. You were, and Mr. Siebrand, and your sec-

(Testimony of Simeon J. Carroll.)

retary. I don't know her name. I don't remember her name now.

Q. Anybody else? A. No, sir.

Q. Was I your lawyer?

A. At that time, yes, for this accident you were.

Q. When had you met me?

A. Well, personally, I don't think I had ever met you. I had always heard of you through the showmen's club, because when I first joined the club, I was told you were their attorney.

Q. Now, we went to the hospital. Who went in the hospital, if anyone?

A. There was Mr. Siebrand, and your secretary, and myself.

Q. And did you encounter the Gossnells in the hospital? A. Mrs. Gossnell, yes.

Q. Mrs. Gossnell? A. Yes.

Q. Did you see anybody else in the hospital, or [210] in the vicinity on that day?

A. Well, there was quite a few people, yes, sir.

Q. Anybody you knew? A. No, sir.

Q. I was going to ask you, did you see Mr. Mahoney?

A. I didn't know him at that time, sir.

Q. Did you see him?

A. Yes, I seen him, but I didn't know him at that time.

Q. Did you talk to Mrs. Gossnell?

A. Yes, sir.

Q. Where?

A. It was in—I don't know whether you call

(Testimony of Simeon J. Carroll.)

it a waiting room or a little corridor in the hospital.

Q. Anybody with you at that time?

A. Mr. Siebrand, and your secretary.

Q. Anybody else? A. No, sir.

Q. Was Mr. Gossnell present? A. No, sir.

Q. Had you inquired about him?

A. Yes. That was the thing I wanted to find out about.

Q. Did you go to see him? [211]

A. No, sir.

Q. You heard Mrs. Gossnell tell of the conversation between herself and you and Mr. Siebrand, and Dorothy Dalton.

Would you relate to us what the conversation was by each party?

A. Well, when we went in, and she was not—they had to send for her.

Q. For whom? A. Mrs. Gossnell.

Q. Yes?

A. And when she came out, why, Mr. Siebrand talked with her a few minutes. Then he introduced me to her, and I wanted to find out how her husband was, and how she was.

Q. Do you know the words that were used?

A. The words?

Q. Well, you heard her say that Mr. Siebrand said, "This is Mr. Carroll, the driver, the man who drove the truck for us"?

A. No, sir, that was not the words.

Q. What were the words?

(Testimony of Simeon J. Carroll.)

A. He said, "This is Mr. Carroll, the driver of the truck."

Q. Are you sure of that?

A. I am positive of that, sir; yes, sir. [212]

Q. Was that true? A. Sure, it is true.

Q. Mrs. Gossnell was courteous to you?

A. Yes, sir, she was. But it seemed like she was a little aloft, and it kind of hurt me, too, because, I mean, because it certainly was not intentional, or anything.

Q. She was not very friendly, is that what you mean? A. Towards me, no, sir.

Q. She didn't say anything?

A. No, sir, she did not.

Q. Did she carry on any further conversation with you, other than to say hello?

A. No, sir, she didn't.

Q. What, if anything, was asked of her by either Dorothy Dalton or Mr. Siebrand?

A. Well, after I stood there for a minute, sir, I went over and sat down, so the conversation they had, I don't know.

Q. Did you go to see her after that?

A. No, sir.

Q. Did you hear about how they were getting along? A. Yes, sir, I did.

Mr. Wilson: You may examine. [213]

(Testimony of Simeon J. Carroll.)

Cross-Examination

By Mr. Raineri:

Q. Well, Mr. Carroll, on this particular day, February 20, 1953, you weren't employed by anybody then, according to your testimony.

A. No, I was not. But I was expecting to be.

Q. I say, though, you weren't employed by anybody, were you? A. No.

Q. And if P. W. Siebrand, or Hiko Siebrand would ask you to drive for them, you would have done it just as well as for anybody else?

Mr. Wilson: I object, as assuming something that is not in evidence, not based on any fact that is before this jury or this Court.

The Court: Yes.

Mr. Raineri: I am cross-examining.

The Court: I don't think it is proper.

Mr. Raineri: I am just asking.

The Court: I ruled on the objection.

Q. (By Mr. Raineri): You weren't employed, then, by anybody, as you testified? Is that right?

A. No, sir, that is right.

Q. You were hanging around the show?

A. I was anticipating going to work, yes, [214] sir.

Q. Like you testified, you were anticipating going to work? A. Yes, I was.

Q. And you had been with that show before, so you were familiar with it? A. Yes, I was.

(Testimony of Simeon J. Carroll.)

Q. And you knew all of the parties——

Mr. Wilson: Did you finish your answer? You said, "Yes, I was." Do you mean you were familiar?

The Witness: Yes, I am familiar with the circus.

Q. (By Mr. Raineri): And you knew all of the parties? You were acquainted with P. W. Siebrand and Hiko Siebrand? You knew them well?

A. Yes, sir.

Q. In fact, you had more dealings with them than you had ever had with William Siebrand before, is that right?

A. I was booked on Mr. Siebrand's show; so far as coming into personal contact, I guess I come into personal contact more with Bill than anyone else.

Q. You really had your dealings with Hiko Siebrand and P. W. Siebrand before?

A. Yes, sir. Well, I never had any dealings with [215] Hiko. They were always with P. W.

Q. P. W.? A. Yes.

Q. And all your business relationship before that had been with P. W. Siebrand?

A. That is right, sir, yes, sir.

Q. Now, when you went over to the hospital, William Siebrand was not with you, was he?

A. No, sir.

Q. And P. W. Siebrand was with you, wasn't he? A. That is right.

Q. And when P. W. Siebrand said to Mrs. Gossnell, he said, to use your words as you gave them; you said that Mr. Siebrand said, "This is the man that was driving the truck," is that right?

(Testimony of Simeon J. Carroll.)

A. That is right, yes, sir.

Q. He didn't say this was the man that was driving the truck for William Siebrand, his nephew? He didn't say that, did he?

A. No, sir.

Q. And William Siebrand was not even there, was he? A. No.

Q. Now, as far as chains on that truck, you didn't have any safety——

Mr. Wilson: I object as being immaterial. [216]

Mr. Mahoney: Immaterial? It is very material.

The Court: He may answer.

Q. (By Mr. Raineri): You didn't have any safety chains on that truck at all, did you?

A. No, sir, I did not.

Q. And you don't know what the relationship between William Siebrand, the nephew, and P. W. Siebrand or Hiko Siebrand was at all, do you?

Mr. Wilson: I object as being immaterial.

The Court: He may answer.

Q. (By Mr. Raineri): You don't know what the relationship was between them?

A. I don't know what you mean.

Q. I mean their business relationship?

A. No, I don't have anything to do with their business.

Q. One more question. Your attorney in this case is Mr. Gibbons, isn't that right?

A. Yes, sir.

Q. It is not Mr. Wilson? A. That is right.

Mr. Raineri: That is all. [217]

(Testimony of Simeon J. Carroll.)

Redirect Examination

By Mr. Gibbons:

Q. Mr. Carroll, calling your attention again to the time that you hooked up this trailer and truck on the lot on East Van Buren Street, can you say positively that you secured that trailer hitch as it should have been, that is, with the pin in the top?

A. Yes, sir.

Mr. Mahoney: I object to that on the grounds it calls for a conclusion. It is improper redirect.

Q. (By Mr. Gibbons): Just tell the jury how you hooked it up.

Mr. Mahoney: Still improper. Same objection.

The Court: He may answer. What I would like to know is where it was broken. I haven't heard anything about that.

Go ahead.

Q. (By Mr. Gibbons): Will you just tell the jury, Mr. Carroll, how you hooked it up?

A. Well, I backed the truck up under it, and backed it up, just like you have seen in the hook-up here, and that is the only way I know to [218] explain it.

And I checked everything. I even checked the tires, walked around the trailer and looked at the tires.

Q. And do you remember whether or not you hit any bumps in driving the truck and trailer, before you got to the bridge?

(Testimony of Simeon J. Carroll.)

A. There is quite a few bumps coming off of the lot on Van Buren, and coming into the street also, sir.

Q. What size are those bumps, ruts, or whatever they may be, coming off the lot?

A. Well, they probably vary. I mean with the water, if you understand what I mean. They usually have some quite, you know, holes there. Of course, I think they try to keep it filled in, or something.

Q. Did these bumps or ruts cause you any trouble in your driving with the truck and trailer?

A. No, sir.

Q. Did you have any trouble at all in your driving the truck and trailer as you proceeded along Van Buren Street toward the Tempe Bridge?

A. No, sir, I did not.

Q. Did you have any reason to think that you might have trouble?

A. No, sir, I did not. [219]

Q. Did you have occasion to see the policeman who was driving behind you as you came upon the bridge, or entered the bridge?

A. No, sir. That was a surprise to me. I didn't even know he was behind me.

Q. Do you know how fast you were driving?

A. I know what he told me. I know I was driving carefully. He told me I was going 20 miles an hour, less than twenty-five, right off.

Q. Are you able to say yourself what speed you were driving when you came upon the bridge?

A. With the accident, and everything, definitely

(Testimony of Simeon J. Carroll.)

I couldn't say it, no; I mean, to put it down to the exact miles an hour, no. I know I was driving less than twenty-five.

Q. Would you say slow or fast?

A. I was driving less than twenty-five.

Q. Mr. Carroll, did you have occasion to look at the trailer hitch after the accident occurred?

A. Yes, sir, I did.

Q. Will you tell the jury what you saw?

A. Well, after the ambulance came and took them away, they got a wrecker, and they pulled the car out, and they put the trailer on the other side, so in the meantime they was directing traffic.

And I went and introduced myself to [220] the officer, and told him who I was.

So then we went over to the trailer, and I discovered it was broken, and I told the officer. And he said, "Let's see if we could find the parts." And we looked around a little, and didn't find no parts, and he said to get it off the highway, and the wrecker taken it off and put it in, I don't know what you call it. I guess it was the city pound, I guess, or something. The city had something to do with it.

Q. Did you see what part was broken, Mr. Carroll?

A. Yes, sir, I guess you would call it the lock, the bolt that goes down through it, anyway.

Q. By the lock, you mean which part of it?

A. I meant the front part, sir.

Q. (Indicating.) This part?

(Testimony of Simeon J. Carroll.)

A. That is right.

Q. That was completely broken, is that right?

A. That is right.

Q. Do you know what caused it to break?

A. No, sir, I don't.

Mr. Gibbons: That is all.

Recross-Examination

By Mr. Raineri:

Q. This car was coming on its [221] right-hand side of the road, the Gossnell car?

A. You mean on their right-hand side?

Q. Yes. A. Yes.

Q. And they were travelling at a reasonable rate of speed?

A. Sir, I couldn't give you any idea of their speed, but I am sure they were.

Mr. Raineri: That is all.

Mr. Wilson: Step down.

(Witness excused.)

Mr. Wilson: I will call Mr. Kelly.

OWEN KELLY

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, Mr. Kelly.

A. Owen Kelly.

Q. What is your business?

A. Manager and operator of the Auto Safety House.

Q. What is that? A. It is a garage.

Q. With a fancy name. Do you know Bill Siebrand? [222] A. Yes, I do.

Q. Did you ever do any work for him?

A. Yes, sir.

Q. What did you do?

A. Well, we have done a little bit of everything, including anything from repairing to building him a trailer chassis.

Mr. Wilson: May this be marked for identification?

The Clerk: Defendants' Exhibit F for identification.

(Said document was marked as Defendants' Exhibit F for identification.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit F for identification, and ask you if you know what it is?

A. This is one of our job tickets.

Q. Who is it for? A. Bill Siebrand.

(Testimony of Owen Kelly.)

Q. On what is it?

A. Building tanden, axle, trailer chassis.

Q. Did you put a hitch on it? A. Yes, sir.

Q. That is a job that you did for them?

A. Yes, sir.

Q. This is the job ticket? [223] A. Yes.

Q. Does it have the hitch on there?

A. Yes, sir.

Q. What kind is it? A. H-co, Hadco.

Q. Hadco, is that what you call it?

A. That is right.

Q. I show you Defendants' Exhibit E in evidence, and ask you if you know this to be a Hadco hitch, such as was put on there?

A. It is a Hadco hitch.

Q. Is that the kind that was put on there?

A. Positively.

Q. Is there another kind? Was there another kind of Hadco hitch?

A. Yes, sir, there is. There is one other type.

Q. I show you Defendants' Exhibit C for identification, and ask you, is this a trailer hitch?

A. It is.

Q. Is it a common trailer hitch? A. It is.

Q. Is this Hadco here, Defendants' Exhibit E in evidence, a common trailer hitch?

A. It is the most popular in the west. [224]

Q. For what kind of trailer?

A. All kinds of house trailers, stock trailers, utility trailers.

Q. Have you had any trouble with it?

(Testimony of Owen Kelly.)

A. No.

Q. Have you seen this hitch before?

A. That hitch?

Q. Yes. A. It looks like one of ours.

Q. Did we get it from you this morning?

A. Yes, sir, you did.

Q. Now, when this hitch is on a trailer, and a trailer is travelling, this jack is not on the trailer, is that it? A. Generally not.

Q. Can it be, if you get it up high enough?

A. What was that?

Q. I say, you can travel with it if you have it up high?

A. Yes. They carry them sometimes, when they are completely up.

Mr. Wilson: I offer that invoice in evidence.

Mr. Raineri: No objection.

The Clerk: Defendants' Exhibit F in [225] evidence.

(Said document was received in evidence and marked as Defendants' Exhibit F.)

Q. (By Mr. Wilson): Referring to Defendants' Exhibit F in evidence, Mr. Kelly, when did you build this trailer?

A. According to this work, we would have started it on December 11th, 1950.

Q. Is there anything to indicate when it was finished?

A. No. But very often it takes a month to complete one, because we don't have an assembly line. We just build them as per direction.

(Testimony of Owen Kelly.)

Q. Now, in your operation, your company sells these hitches, does it not? A. Yes.

Q. Do you have the exclusive agency for them?

A. No, sir, we do not, but we sell quite a few of them.

Q. You buy them from the manufacturer and sell them yourselves?

A. Yes. And then we use them in our own trailers.

Q. Assuming that you put this on there some-time during the month of January, 1951, would that be correct? [226] A. That would be right.

Q. And that this trailer had received normal use by 1953, February 20, 1953, was there any necessity in your mind of replacing the hitch if no defects were apparent?

A. No, they should last much longer than that.

Q. Do they ever replace them if they aren't broken? A. Not unless they have been broken.

Q. They could eventually wear the ball, I assume?

A. Oh, yes, balls are sometimes replaced. Generally, though, because it may not fit in good with each trailer hitch they have to buy another one.

Mr. Wilson: That is all.

Cross-Examination

By Mr. Raineri:

Q. How much wear there was on this particular trailer hitch you wouldn't know, would you?

A. No, sir.

(Testimony of Owen Kelly.)

Q. It could have been worn and the ball worn and in defective condition, and as far as you were concerned, you wouldn't know, would you?

A. No, sir.

Mr. Raineri: That is all. [227]

Redirect Examination

By Mr. Wilson:

Q. If the ball were worn, and the ball didn't break off of the trailer, would you say the ball was in defective condition——

Mr. Raineri: He says he doesn't know.

Q. (By Mr. Wilson): I say, assuming the ball was not worn, and it didn't break off, the ball didn't break off of the truck at all?

Mr. Raineri: I object to that.

The Court: You have had your assumption.

Q. (By Mr. Wilson): The testimony here, Mr. Kelly, is that an accident occurred, and that the trailer hitch broke, as far as anybody knows.

The officer said it didn't break. He said it had a hole in it, it had threads in it, but the operator of the truck said that the thing broke. and the trailer came off, and he had no indication of it.

Can this trailer hitch break? Can it break?

A. Yes, sir. It is mechanical. It can break.

Q. It can break and let the trailer loose?

A. Yes, if it would break, it would be the [228] end of that.

Mr. Wilson: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Wilson: I call William Siebrand.

WILLIAM SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, please.

A. William Siebrand.

Q. I hand you Defendants' Exhibit G for identification, and ask you if you have seen this document before?

A. Yes, sir. It is the title to my trailer.

Q. Now, I hand you Defendants' Exhibit F in evidence, and ask you if this Defendants' Exhibit F in evidence is the invoice for this same trailer?

A. Yes, sir.

Q. And is that the title for this trailer that is mentioned in the invoice?

A. Yes, sir.

Q. Is that the trailer that is involved in this accident? [229]

A. Yes, sir.

Mr. Wilson: I offer Defendants' Exhibit G in evidence.

Mr. Mahoney: We have no objection.

The Clerk: Defendants' Exhibit G in evidence.

(Said document was received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Wilson): Where were you on February 20, 1953, at the time of the occurrence of this accident?

A. Mesa.

(Testimony of William Siebrand.)

Q. Do you know Simeon Jelkes Carroll?

A. Yes, sir.

Q. Has he been on the Siebrand show that belongs to Hiko and Peter Siebrand?

A. He operated a concession of his own.

Q. Do you have any interest in, or did you on the 20th day of February, 1953, have any interest in Siebrand Brothers Circus and Carnival?

A. No, sir.

Q. Do you know of your own knowledge who on that day was the owner of Siebrand's Carnival and Circus?

A. P. W. Siebrand and Hiko Siebrand.

Q. They are your uncles? [230]

A. Yes, sir.

Q. And what is your business?

A. I have this concession.

Q. What business did you have on that day, the 20th of February?

A. I was not doing nothing that day. I was in Mesa.

Q. Had you ever worked for Hiko and Pete on the show? A. Yes, sir.

Q. Had you worked for them prior to the time of the accident? A. Yes, sir.

Q. How close to the time of the accident?

A. Oh, it was about two days—the day before.

Q. Had you been working for them some time before that? A. Yes, sir.

Q. Where? A. In their winter quarters.

Q. Doing what?

(Testimony of William Siebrand.)

A. Building stuff, building trailers, repairing, work on my own stuff.

Q. Had you made a transaction or a deal with Carroll prior to the day that he took the trailer over there? [231]

A. We was going to operate this bird store in partnership when we got the birds in, but they never come in yet.

Q. Did you talk to him about it?

A. Yes, sir.

Q. Did you ask him to bring the trailer over?

A. Yes, sir.

Q. Has Pete or Hiko Siebrand any interest in that trailer? A. No, sir.

Q. Have they ever used that trailer for their own use, in any way whatsoever? A. No, sir.

Q. Did they buy the trailer for you?

A. No, sir.

Q. Have they ever participated as an owner or partner in the operation of the trailer as a concession? A. What is that again?

Q. Have Hiko or Pete ever participated as an owner or operator in the trailer as a concession?

A. No, sir.

Q. Have you operated that trailer as a concession, or had it operated on their show?

A. Yes, sir.

Q. How many times? [232]

A. Three years.

Q. At what part of the year does their show operate?

(Testimony of William Siebrand.)

A. From March, from February or the first of March until November.

Q. And where does it operate?

A. In the western states, New Mexico, Arizona, Texas, Colorado, Utah, Idaho, Montana.

Q. And you operated this show yourself on their show, this trailer? A. No, sir.

Q. Did you have somebody else operate it for you? A. Yes, sir, partnership.

Q. But it was not Carroll? A. No, sir.

Q. What was this trailer termed as?

A. Bird store.

Q. And did you see the trailer when it got to Mesa? A. Yes, sir.

Q. When had you last seen the trailer before it got to Mesa?

A. I saw it, I think, the night before.

Q. Do you know its contents the night before?

A. There was nothing in there but an aviary and [233] a mirror.

Q. What is an aviary?

A. Bird cage, large cage for birds.

Q. And did you see inside of it when it got to Mesa? A. Yes, sir.

Q. Was it any different than it was the night before? A. No, sir.

Q. Was it skinned up a little?

A. It had a few holes in the front.

Q. How much?

A. Oh, about five, six holes in it, some about

(Testimony of William Siebrand.)

four or five inches in diameter. I think there was one larger than that, about a foot.

Q. When was the last time you had moved this trailer yourself? I mean, approximately?

A. I don't know. Maybe the day before, a couple of days before.

Q. What were you doing with it?

A. Getting it ready, painting it.

Q. I mean, when was the last time you pulled it with a motor vehicle on the highways?

A. On the highway?

Q. Yes. A. It was in the fall. [234]

Q. When in the fall?

A. I think it was around the first of November when we come in, in 1952.

Q. And where did you keep it on the lot?

A. We kept it right there where we keep all the trailers.

Q. A lot of other people have trailers there?

A. A lot of other people have trailers and house trailers.

Q. You mean concession trailers and house trailers?

A. Concession trailers and independent trailers.

Q. Do Siebrand Brothers, or did at that time—I don't mean from the standpoint that they were not in business on that day, the last time they operated prior to the accident, and the first time they operated after the accident, did Siebrand Brothers, as Siebrand Brothers Circus and Carnival, operate any concessions or things of that type of their own?

(Testimony of William Siebrand.)

A. No, sir.

Q. Now, what on this show constitutes the general run of concessions? A. What kind?

Q. Yes. [235]

A. Various kinds. Some with darts, ball games, throwing milk bottles, galleries, shooting galleries, eating stands, race horse game.

Q. None of which belonged to the Siebrand Brothers, I mean, Hiko and Pete? A. No, sir.

Q. Do you know of any one who has any interest in Siebrand Brothers' show other than Hiko and Pete? A. I do not know of any one.

Q. And about how many concessionnaires, would you say, were on the show the year before the accident and the year of the accident, after the accident?

A. It was about, it ranged all the way from twenty-five to fifty, sixty.

Q. Do you know of the arrangement that was made with them whereby they came upon the show?

A. What was that again?

Q. Did they have any arrangement with Hiko and Pete about being on the show?

A. You mean these concessionnaires?

Q. Yes.

A. No. When they get there they are there. If they are not there, they are just not there.

Q. What do you mean by that?

A. They just set them there and rent them [236] the space when they come there, when they get ready to set up the show.

Q. Where is that?

(Testimony of William Siebrand.)

A. At each fair, each town they come into.

Q. Do they have any contract with them at all?

A. No, sir.

Q. Do Hiko and Pete pay them to be there?

A. No, sir. They rent on footage, and rent on a percentage basis.

Q. What is that?

A. On footage, pay so much a foot, plus percentage. It depends on what fair they are playing. Some fairs have more, some less.

Q. Why is that?

A. They have to pay more for their fair. Arizona Fair had about 300 concessions out there.

Q. How long have you been around the carnival and circus?

A. Oh, a good many years. I grew up on it for a while. Then I went into the Army, and went back into it again after the Army.

Q. Did it change any, the arrangement between the owner and the concessionnaires?

A. Not that I noticed of any, I didn't see no difference.

Q. How did you move this bird store [237] trailer the year before, the last time you dragged it upon the highway yourself?

A. With my own Ford pick-up. I got a red Ford pick-up.

Q. On the day of the accident, where was your red pick-up? A. It was on the ground.

Q. Where? A. On East Van Buren.

Q. Where on East Van Buren?

(Testimony of William Siebrand.)

A. In the winter quarters lot.

Q. What was it doing?

A. Just sitting there. He was supposed to take that Ford and put it on that trailer, which belongs to the trailer.

Q. And what happened?

A. I guess he took the wrong truck, wrong pick-up. He took the show pick-up instead of mine.

Q. Do you have authority? Did you have authority on that day to have authorized Mr. Carroll to have driven Pete's and Hiko's truck?

A. No, I don't have no authority over their trucks.

Q. When did you have a conversation, if ever, with him that resulted in his taking this trailer from the lot? [238]

A. The day before we went over there, the day before he drove over there with it.

Q. Did you go into business with Mr. Carroll on the day of the accident?

A. No, sir.

Q. On the following day?

A. When we got over there, we was going to have this bird store. The birds never come.

Q. You intended to do it?

A. Yes. Later on; the birds never come, so we put another game in there.

Q. How much later?

A. Five days later.

Q. You did finally go into business with him five days later?

A. Yes, sir. Partnership.

Q. What were the terms of the partnership?

A. Fifty-fifty, after the expenses.

(Testimony of William Siebrand.)

Q. Did he operate the show for you some length of time?

A. The concession, you mean, the bird store?

Q. Yes. A. Yes.

Q. How long have you known Mr. Carroll?

A. Oh, I have known him since 1948.

Q. And he had not had an arrangement with you [239] by operating your concession a week prior to this accident? A. No, sir.

Q. Do you know personally whether or not Pete and Hiko, or any other carnival owner, shares in the losses of the concessionnaires?

A. No, I don't.

Q. You mean you don't know, or do you know they don't?

A. I know they don't. Most shows are operating about the same way, just like a Safeway Store, and business places that work on a percentage rental basis. It has been going on for years.

Q. Do the concessionnaires participate in the profits of the show that they are on?

A. No, sir.

Q. Now, did you have a sign on this trailer?

A. I got, "Siebrand Brothers Circus and Carnival" on there, a sign there.

Q. Is it a sign?

A. Just like Coca-Cola does with some of them.

Q. Who put it on there? A. They did.

Q. Who did?

A. Siebrand Brothers, as an advertising.

Q. How did that come about? [240]

(Testimony of William Siebrand.)

A. Well, they just put it on there, just like Coca-Cola does.

Q. Where does Coca-Cola put their sign?

A. They put them on—I know stands that have them on for them, they paint them for them.

Q. You mean concessions?

A. Concessions, yes.

Q. Who paints them for them?

A. The company puts them on for them.

Q. And the circus painted this sign on there?

A. Yes, sir.

Q. On your trailer? A. Yes, sir.

Q. They paid for it? A. Yes, sir.

Q. Do you remember when it was put on there?

A. No, I don't. I think it was on in 1952. I don't know if it was repainted in 1953 or not.

Q. Did that give them any ownership in your trailer? A. No, sir.

Q. In your business? A. No, sir.

Q. Are you in anyway engaged in a partnership with Hiko and Pete? A. No, sir. [241]

Q. Were you on that day? A. No, sir.

Q. Was Hiko and Pete's circus and carnival operating on that day? A. No, sir.

Q. Do you know when they first operated that season? A. They opened on Saturday.

Q. Do you know whether or not you move your concession in concert with their trucks when the show moves? A. No.

Q. Or whether you move independently?

(Testimony of William Siebrand.)

A. The show takes care of their trucks, and all the concessionnaires take care of their own stuff.

Q. Do you have a trailer house?

A. Yes, sir.

Q. And where was it parked?

A. On the winter quarters lot.

Q. On the day of the accident?

A. Yes, sir.

Q. You have an automobile that pulls it?

A. Yes, sir.

Q. And when you move from one place, when you did move from one place to the other during the [242] season prior to the accident, and the season after the accident, did you move the house trailer, too? A. Yes.

Q. Did you live in it? A. Yes, sir.

Q. Is that common? A. Yes, sir.

Q. Do you have a hitch on it?

A. Yes, sir. Practically all show people live in house trailers.

Q. You went over and got this thing at the Auto Safety House this morning, didn't you?

A. Yes, sir.

Q. This Defendants' Exhibit D, and that is the same thing that was on your trailer?

A. Yes, sir.

Q. Same kind exactly? A. Yes, sir.

Q. Is it ordinary to have this hole exposed with the threads in it when it is in operation, when the trailer is in use?

A. You mean when it is towing it?

(Testimony of William Siebrand.)

Q. Towing it.

A. No. You don't need it when you are towing it. It is just for jacking up when you park.

Q. You put the jack in when you park? [243]

A. Yes, sir. Or you can leave it in there, just so it don't stick down there.

Q. If you have it up high? A. Yes, sir.

Q. When this trailer got to Mesa, was this jack in there on that day? A. No, sir.

Q. What did you finally do about a trailer hitch on this trailer? A. We replaced it.

Q. Are you familiar with that type of hitch?

A. Yes, sir.

Q. Is it common?

A. It is a common hitch.

Q. Did you look at that hitch at any time when you were readying the trailer for the season of 1953?

A. Well, it was all right a couple of days before there. I didn't notice it right at the time it was hooked up, because I wasn't there.

Q. Have you had trouble with trailer hitches?

A. No, sir.

Q. On your trailers? A. No, sir.

Q. What was the condition of the hitch two days before when you looked at it last? [244]

A. It was all right.

Q. Was it two days before?

A. About two days.

Q. Anything wrong with it?

A. No, sir, not that I know of.

Q. Do you know of your own knowledge after

(Testimony of William Siebrand.)

the truck got to Mesa, that Pete and Hike's truck got to Mesa, did you look at the ball on the truck to see if there was anything wrong with it?

A. No, I didn't.

Q. Bill, are you one of the defendants in this action? A. No, sir.

Q. Have you ever seen any papers?

A. No, sir.

Q. Do you know anything about who is suing who? A. Through reading about it.

Q. Nobody served you with anything?

A. No, sir.

Q. Have you at any time been questioned about this matter, other than on the stand here?

A. No, sir.

Q. Anybody take your deposition?

A. No, sir.

Q. Have you concealed yourself from process in any way? [245] A. No, sir.

Q. Did you tell anybody this trailer belongs to anybody else but you?

A. Most of them know it is my trailer.

Q. But neither the plaintiff nor his counsel have questioned you on it at all? A. No, sir.

Mr. Wilson: That is all.

(Testimony of William Siebrand.)

Cross-Examination

By Mr. Raineri:

Q. You testified that you share in the gross profits with Siebrand Brothers, is that right?

A. No, I don't. I give them a rental, percentage rental.

Q. Didn't you use the word "profits" when you testified?

A. No, sir.

Q. You said you share in the profits?

A. No, sir.

Q. You didn't use that word at all?

A. No, sir.

Q. When you run your concession stand and you take some money, is that called a profit?

A. No, sir.

Q. That is not called a profit? [246]

A. No, sir. That is your expense. You got to pay out your rent there, and then you get the profit. The show don't get the profit.

Q. You don't work for any profit at all, do you?

A. Yes, sir.

Q. Where does the profit come from?

A. If there is any profit left after we pay the rent and expenses, if there is any left we get the profit.

Q. You make a gross profit?

A. What do you mean, gross profit?

Q. I mean, do you take any money in?

A. We take money in, sure. And we pay out the

(Testimony of William Siebrand.)

expenses, and we pay the rent for the privilege of sitting at the carnival, or the fair.

Q. You do take in a gross profit, and you split?

A. We don't take in no gross profit.

Q. Do you share 25 per cent of what you take in with Siebrand Brothers? A. No, sir.

Q. You don't share that with them?

A. No, sir. We pay them a rent.

Q. You have never been near Mr. and Mrs. Gossnell, have you? [247] A. No, sir.

Q. In fact, you never tried to get in touch with them in any way, did you? A. No, sir.

Q. You were on the grounds, on the winter grounds, you testified before, on the 20th day of February, 1953, weren't you?

A. No, sir. I didn't testify that.

Q. You weren't on the grounds that day?

A. The day before I was over in Mesa, the day of the accident.

Q. Had you been over on the grounds here on Van Buren?

A. I have been on the grounds. Sure, I have been there.

Q. Your trailer was parked there?

A. I lived there.

Q. You lived there, is that right?

A. Yes. But I was in Mesa before the accident happened.

Q. But you had been there earlier that day, hadn't you?

A. Early in the morning, yes.

(Testimony of William Siebrand.)

Q. Now, in fact, according to your own testimony here today in court, you weren't in business at all on the 20th day of February, 1953. [248]

A. No, we had to go to Mesa first to be in business.

Q. I say, you didn't have any concession of any kind, then, because you didn't have any birds, isn't that right? A. That is right.

Q. Now, you have been born or you are a nephew of Hiko Siebrand and P. W. Siebrand, aren't you?

A. Yes, sir.

Q. And you have testified here that you have been born and raised with that circus or carnival?

A. I was not born and raised with them. I have been off and on, and I went in the Army.

Q. Prior to the time you were in the Army, ever since you were a boy, you were with this show?

A. No, sir, I was with other shows.

Q. Were you with this show?

A. Sure, I was with this show.

Q. Now, if Hiko Siebrand or P. W. Siebrand at any time would ask you to let them use your trailer, you would let them use it, wouldn't you?

Mr. Wilson: I object as assuming something not in evidence.

The Court: Yes. We are interested in this particular day. [249]

Mr. Raineri: If I ask him that question and restrict it to that particular day, would that be all right?

The Court: Yes.

(Testimony of William Siebrand.)

Q. (By Mr. Raineri): If they had asked you that particular day, the 20th of February, 1953, to use your trailer, you would have let them use it, is that right?

Mr. Wilson: I object as immaterial.

The Court: He may answer.

Q. (By Mr. Raineri): Would you?

A. I don't know.

Mr. Raineri: All right. That is all.

Mr. Wilson: What was that answer?

The Witness: I don't know.

Mr. Wilson: Read the question.

(The record was read as requested.)

Mr. Wilson: That isn't the answer you made?

The Court: I didn't hear it.

The Witness: I said, I don't know.

Mr. Mahoney: He said, "I don't know." That is the answer he gave.

Mr. Raineri: That is all.

Mr. Wilson: That is all.

(Witness excused.) [250]

Mr. Wilson: I will call Joe Steinberg.

JOSEPH STEINBERG

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows.

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Joseph Steinberg.

Q. What is your business, Mr. Steinberg?

A. I am a concessionnaire.

Q. Do you know Pete and Hike Siebrand?

A. Yes, sir.

Q. How long have you known them?

A. Oh, I know him for probably 20 years.

Q. Do you know Siebrand Brothers Circus and
Carnival? A. Yes, sir.

Q. Are you on that show now?

A. I am at present, yes, sir.

Q. How long have you been on it?

A. I have been off and on for the last five years. I travel, I am with the Siebrands maybe for five or six weeks. If a good spot comes up in a different part of the country, I hook up my trailer to my truck and move on to a different spot. [251]

Q. Were you on there in 1953?

A. In 1953, yes, sir.

Q. And did you show at Mesa in 1953?

A. Yes, sir.

Q. Were you on there in 1952?

A. I was on there in part of 1952.

Q. Are you familiar with the winter quarters

(Testimony of Joseph Steinberg.)

of the Siebrand Brothers Circus and Carnival here in Phoenix?

A. Yes. As a matter of fact, I left my equipment there last winter.

Q. Have you left it there before that?

A. Oh, yes, time and again.

In fact, winter quarters of a show is always regarded as a courtesy for the concessionnaire.

If I happen to finish the season with any particular show that I had my concession on, and it was too far from my home base, which is Los Angeles, why, I would leave the equipment there, because in the spring we usually open with the show we close with, and then as the season goes on, when the different fairs and celebrations start, we go on to wherever we think we can do best.

Q. Are you a regular concessionnaire?

A. Have been for 40 years.

Q. What kind of a concession do you [252] operate?

A. At present I have got a race horse game. It is a game where the individual players roll balls, and the balls drop into the hole, and it makes the horse go, and the first horse that crosses the finish line wins the race, and it costs a dime to play.

Q. Is that in a trailer?

A. That is in a trailer, yes, sir.

Q. Do you have any other trailers?

A. No, I just have got the one trailer, and the truck.

Q. You don't live in a house trailer?

(Testimony of Joseph Steinberg.)

A. I don't any more. I am getting a little too old, and I stay in motels, now.

Q. During the 1952 season, prior to this accident on February 20th, while you were with Siebrand Brothers Circus and Carnival, what arrangement did you have with them with regard to the payment of anything?

A. I had the same arrangement with them the same as I have with anybody else, that that particular spot they got 25 per cent of the gross receipts as rental.

The other spots we pay a flat rental, maybe \$50.00, \$30.00 a week.

At a fair like Pomona, or your State [253] Fair here in Arizona, you will pay a rental of from seventeen to twenty-five dollars a front foot.

Mr. Mahoney: If the Court please, I would like to interrupt the witness to ask what is the materiality of this?

The Court: I don't know.

Mr. Mahoney: I will object to this line of testimony.

The Court: I will sustain it.

Q. (By Mr. Wilson): What arrangement did you have, Mr. Steinberg, with the Siebrands for the year 1953?

Mr. Mahoney: Same objection, for the same reason.

The Court: He may answer.

Mr. Mahoney: He is a third party here.

The Court: I know.

(Testimony of Joseph Steinberg.)

The Witness: I paid them, as I said, at different spots—at some spots I paid them \$50.00 a week, a flat rental, and then at the various fairs and celebrations, some fairs were \$2.00 a foot plus 25 per cent for rental, and at another spot like——

The Court: Why are we going all through that again?

Q. (By Mr. Wilson): Were you operating, were you in [254] business on February 20th? Were you showing some place on February 20th, 1953?

A. February 20?

Q. Yes.

A. Was that the week of the Mesa Fair?

Q. Where did you first open?

A. I was showing at the Mesa Fair, and I believe that is about the date.

Q. You started at the Mesa Fair?

A. Started at the Mesa Fair, yes.

Q. Did Siebrand Brothers participate in your profits from your concession?

A. Nobody but my wife participates in my profits.

Q. Do they direct you in the hiring and firing, or operation of the game?

A. A concessionnaire is called an independent concession.

The Court: Say yes or no.

The Witness: No.

Q. (By Mr. Wilson): Do you participate in any of the profits of Siebrand Brothers Circus and Carnival? A. No.

(Testimony of Joseph Steinberg.)

Q. Do they participate in your losses? [255]

A. Absolutely not.

Q. Haven't been able to get them to?

A. No.

Mr. Wilson: You may examine.

Mr. Mahoney: No questions.

Mr. Raineri: No questions.

(Witness excused.)

Mr. Wilson: I call Hiko Siebrand.

HIKO SIEBRAND

called as a witness in behalf of the defendants, have been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are Hiko Siebrand?

A. That is right.

Q. You are a brother to Pete?

A. That is right.

Q. And you are an uncle to William?

A. That is right.

Q. You are an owner of Siebrand Brothers
Circus and Carnival? A. Yes, I am.

Q. How long have you been so?

A. Ever since its beginning.

Q. And what are your duties in it? [256]

A. I am the bookkeeper.

Q. The bookkeeper? A. Yes.

Q. You keep the money, too, don't you?

(Testimony of Hiko Siebrand.)

A. Try to.

Q. Where were you on February 20th?

A. I was home. I was sick.

Q. How long had you been home sick?

A. Well, I was laid up a couple of years. I had them heart attacks, and I was not in action until——

Q. Do you know Mr. Carroll? A. Yes.

Q. Did you know him before February 20, 1953?

A. Yes.

Q. Had he been a concessionnaire on your show?

A. Yes, as far as I know, yes. That is all I have ever known him to be.

Q. I am sorry, I didn't hear you.

A. That is all I have ever known him to be, a concessionnaire.

Q. Has he ever been an employee of Siebrand Brothers Circus and Carnival? A. No.

Q. Prior to or on February 20, or thereafter?

A. Never. [257]

Q. 1953? A. Never.

Q. Has he ever done anything for you on a contract? A. Never.

Q. Has he ever driven a truck for you?

A. No.

Q. Did anyone ask you for consent for Simeon Jelkes Carroll to drive a red pick-up belonging to you and Pete on the 20th day of February, 1953, for the purpose of hauling Bill Siebrand's trailer to Mesa, or for any other purpose? A. No.

Q. Does Bill Siebrand have your tacit, or actual

(Testimony of Hiko Siebrand.)

consent, did he have it around February 20, 1953, to use a red pick-up that belonged to you and Pete?

A. No.

Q. Didn't he ever have it? A. No.

Q. Do concessionnaires drive your trucks?

A. No.

Q. Do you ever haul concessionnaire's equipment for them? A. No.

Q. Do you travel in caravan, or any other [258] type of—— A. Convoys?

Q. Convoys with concessionnaires?

A. Yes.

Q. You do travel your own equipment in convoy? A. Yes.

Q. How many trucks do you and Pete have to carry the circus?

A. About 35 trucks and trailers. Thirty-seven in all.

Q. Do you own any concessions? A. No.

Q. Operate any concessions? A. No.

Q. Did you in 1952 or 1953? A. No.

Q. What was the basis upon which you allowed concessionnaires to come upon your show prior to February 20th, and on February 20, 1953, and after February 20, 1953?

A. Well, it has been stated here over and over, pay rental. At different times, different prices.

Q. Who would they pay the rental to, as a rule?

A. They pay it to the company.

Q. Who in particular? [259] A. To me.

Q. How, in general, is rental determined?

(Testimony of Hiko Siebrand.)

A. Well, rental is——

Q. Maybe I can save time. You heard their testimony here? A. Yes.

Q. Do you disagree in any way with that?

A. No.

Q. Is that correct? A. Yes.

Q. You want to be bound by that testimony?

A. Yes.

Q. When did you first hear of this accident?

A. About in the afternoon.

Q. When did you get out of bed and come back to work on this show?

A. The next week, when we came to Phoenix. It was about twelve days in between there.

Q. And you had been in bed several years, or several months?

A. Well, not exactly in bed, but not in action.

Q. On account of illness? A. Yes.

Mr. Wilson: You may examine. [260]

Cross-Examination

By Mr. Raineri:

Q. Mr. Siebrand, you remember your deposition being taken in this case approximately a year ago?

A. Yes.

Q. Do you remember you were asked questions regarding this matter? A. Yes.

Q. All through your examination on that particular occasion, you never did use the word——

Mr. Wilson: Just a moment.

The Court: That isn't the way to do that.

(Testimony of Hiko Siebrand.)

Mr. Raineri: All right.

Q. (By Mr. Raineri): Referring to your sharing of the money that was taken in, did you on that particular occasion testify that William Siebrand paid 25 per cent to you folks?

Mr. Wilson: Just a moment.

The Witness: I don't know whether I did or not. I don't think so.

Mr. Wilson: Hiko, listen to me. Don't answer a question when I am objecting. Just a second now.

I object to it, your Honor, on the [261] ground that it is not properly put to the man.

The Court: No, it is not.

Q. (By Mr. Raineri): Well, on that occasion when you were——

The Court: Find the place.

Mr. Raineri: Page 20.

The Court: All right, let him read it, and then you ask him the question.

Mr. Raineri: I will ask him the question.

The Court: Let him read it.

Mr. Raineri: All right.

Q. (By Mr. Raineri): Were you asked these questions here on page 20 by Mr. Cracchiolo, the attorney who questioned you at that time?

“Q. What kind of dealings do you have with your nephew, William Siebrand, with direct relation to your show?

“A. Not any different than any of the other ones.

(Testimony of Hiko Siebrand.)

“Q. I want to know just what those are?

“A. He pays a percentage on his concession.

“Q. What percentage does he pay?

“A. Twenty-five per cent.”

The Witness: That has been said here time [262] and again.

Q. (By Mr. Raineri): Well, did you make those answers?

A. He paid twenty-five per cent.

Q. Yes.

A. For the privilege of sitting there.

Q. That is what my question was. And that was your answer at that time, is that right?

A. Yes.

Q. Now, your show, these concessions and your show, they all travel and operate as a unit, isn't that right?

A. Not as a unit, no. They operate individually. They can go to the town I am at, or they don't have to. But the rest of it must go, that belongs to me goes there.

Q. You don't travel, then, as a unit, is that right?

A. Not with those independents, no, no more than tell you to drive that street with your car.

Q. Now, I will let you read this on page 16 of the deposition.

Did Mr. Cracchiolo ask you this question, starting on the bottom of page 15?

(Testimony of Hiko Siebrand.)

“Q. Would you say most of the trailers involved in your particular circus and carnival have names on them? [263] Let us put it that way.

“A. Well, no, they haven’t all got names on it.

“Q. Do you travel as a road unit, sir? You are a road unit, is that right? A. Yes.”

A. Yes, that is, my convoy, my stuff, not somebody else’s.

Q. Did you give that answer at that time?

A. My stuff. Yes.

Q. Now, on page 27, did Mr. Cracchiolo ask you this question?

“Q. Mr. Cracchiolo——”

This is your attorney, Mr. Wilson, questioning you.

“Q. Mr. Cracchiolo asked you if you gave concessionnaires, and particularly Bill Siebrand, William Siebrand, the right to come under the name of Siebrand Brothers Circus and Carnival?

“A. Well, they operate under the show, because we are the only ones that do the advertising. See, no individual does advertising. [264]

“Q. What do you mean by operate?

“A. Well, we operate as a unit, see.”

Did you give that answer?

A. Yes, that is my stuff again, the same question.

Q. But you are talking about William Siebrand?

A. No, I am not. Same question.

Q. Now, on this particular day of March, or February 20, 1953, you weren’t near the grounds at all? You were sick on that day, is that right?

(Testimony of Hiko Siebrand.)

A. That is right.

Q. So as far as you are concerned personally, you do not know what happened at that particular time?

A. No, I don't.

Q. Because you weren't around, you don't know anything about the dealings, or who was driving what?

A. That is right.

Q. Or who had given any directions to do what, is that right?

A. That is right.

Mr. Raineri: That is all.

Mr. Wilson: That is all.

(Witness excused.)

Mr. Wilson: I will call Ralph Horsmann. [265]

RALPH HORSMANN

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name?

A. Ralph Horsmann.

Q. What is your business, Mr. Horsmann?

A. Concessions.

Q. Did you have a concession prior to February 20, 1953, and after February 20, 1953, on the Siebrand show?

A. Yes, sir.

Q. What kind of a concession?

A. Well, I had three different ones, four different ones at that time.

(Testimony of Ralph Horsmann.)

Q. You are also a relative of the Siebrands, aren't you?

A. My wife is a niece of the Siebrands, yes.

Q. But you are not a relative? A. No.

Q. You had four concessions on the show?

A. Yes.

Q. What kind were they?

A. Well, my wife and I have a pop and ice cream stand, and I had a scale and two ball [266] games.

Q. Did you carry each one of these in a separate trailer?

A. Well, I pulled my ice cream and pop stand with one truck.

Q. Was that constituted in one trailer, one of these things where you lift the flaps, and so forth?

A. Yes, one trailer. And my ball games, I hauled them in another trailer.

Q. And your scales?

A. They went in the same trailer as the ball games.

Q. So you had two trailers, is that right?

A. That is right.

Q. And were these trailers—take the one of the food concession, where you sold pop, ice cream, sandwiches, is that correct? A. Yes.

Q. How big a trailer is it?

A. Twenty-four feet.

Q. Standard width? A. Standard width.

Q. And when you got there and screwed down

(Testimony of Ralph Horsmann.)

this jack and let the sides down, you were in business, is that right? A. That is right. [267]

Q. As you went down the highway, were the sides of this trailer solid? A. Yes.

Q. It looked like—— A. A van.

Q. A van. What was painted on the outside of it?

A. Last year I had nothing on the outside of it. This year I have an ad from the Pepsi-Cola Company on the outside of it.

Q. What does it say?

A. "For a light refreshment, drink Pepsi-Cola."

Mr. Mahoney: I will object on the grounds I can't see the materiality.

The Court: I don't either.

Q. (By Mr. Wilson): Does the Pepsi-Cola Company own your concession? A. No.

Q. Own any interest in it? A. No.

Q. Participate in the profits? A. No, sir.

Q. Does it participate in the losses?

A. No, sir.

Q. Does Siebrand Brothers have any interest in [268] your concessions? A. No, sir.

Q. Do they participate in the profits?

A. No, sir, not in the profits.

Q. Do they participate in the losses?

A. No, sir.

Q. Do you pay them a rental? A. Yes, sir.

Q. What kind of a rental?

A. On a basis of 25 per cent on still spots, and some fairs we have to pay footage and 25 per cent,

(Testimony of Ralph Horsmann.)

ranging all the way from a dollar up to seven and a half, ten, different prices, different fairs.

Q. Do you drive their trucks? A. No, sir.

Q. Is there anything about this whole thing other than business? A. No, sir.

Q. Do you know of any concessionnaires who have ever driven any of their trucks?

A. No, sir.

Mr. Wilson: You may examine.

Mr. Mahoney: No questions.

Mr. Raineri: No questions.

Mr. Wilson: That is all. Step down.

(Witness excused.) [269]

Mr. Wilson: I will call Mrs. Ritter.

CORA RITTER

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name. A. Cora Ritter.

Q. What is your business?

A. Concessionnaire.

Q. You are on the Siebrand show?

A. Yes, sir.

Q. How long have you been with them?

A. Oh, on and off possibly seven or eight years.

Q. And you operate your concession in a truck and trailer? A. Trailer.

(Testimony of Cora Ritter.)

Q. What kind of a trailer is it?

Mr. Mahoney: Same objection, your Honor.

The Court: Yes. I think this is becoming a little cumulative, isn't it?

Mr. Wilson: I thought we would shift to a woman, Judge.

The Court: It would be the same.

Q. (By Mr. Wilson): You heard the other testimony, [270] and you have the same arrangement as these other men have, the same arrangement?

A. Yes, sir.

Q. You have been with them for about seven years?

A. Yes, sir.

Q. You don't participate in their profits, and they don't participate in yours?

A. No, sir.

Mr. Wilson: That is all.

Mr. Raineri: No questions.

(Witness excused.)

Mr. Wilson: I will call Peter Siebrand, Junior.

PETER H. SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Peter H. Siebrand.

Q. You are not junior, then?

A. Not quite.

(Testimony of Peter H. Siebrand.)

Q. But Pete Siebrand is your father?

A. Yes. [271]

Q. And he is the Siebrand sitting here beside me?

A. Yes.

Q. Now, do you operate a concession on the Siebrand show?

A. No, I don't.

Q. On the day of this accident, which you have heard us talking about, did you come upon the accident?

A. Yes, I did.

Q. Where?

A. On the bridge going to Tempe.

Q. Where had you come from?

A. I had come from home, or from town. I believe the last time I come from buying parts up town. I was up town.

Q. What kind of a car were you in?

A. I had a pick-up, green pick-up.

Q. Who did it belong to?

A. It belongs to me.

Q. To you personally?

A. Yes.

Q. Where were you going?

A. I was going in the general direction of Mesa.

Q. Did you know that Mr. Carroll was [272] driving this truck that belonged to your father and Hiko?

A. No, I didn't.

Q. Did you encounter him at some place between Phoenix and Mesa?

A. No.

Q. Or did you come up on him on the highway?

A. Just come up on him.

Q. That was after the accident had occurred?

A. Yes.

(Testimony of Peter H. Siebrand.)

Q. And you testified it was then that he had learned that he had the wrong truck?

A. That is right.

Q. And did you help Carroll?

A. Yes, I did.

Q. In what respect?

A. Well, after the trailer had been moved off the bridge, it was moved to the parking lot on the side, and we fixed up the hitch. We fixed the hitch and took it to Mesa.

Q. Now, referring to Defendants' Exhibit D in evidence, this trailer hitch here, is that the kind of hitch that was on it? A. That is right.

Q. And you were with me this morning when we got that from the Auto Safety House?

A. Yes. [273]

Q. Do you know the name of it?

A. No, I don't.

Q. Did you fix the hitch, or have it fixed?

A. Yes.

Q. And you took it to Tempe to do it?

A. Yes.

Q. And then in that condition you took it on to Mesa? A. I did.

Q. And Carroll was with you? A. Yes.

Q. Can you tell what happened to the hitch?

A. Actually, I don't know.

Q. What?

A. I don't know actually what happened to it, how it happened.

Q. What did you do to it to fix it?

(Testimony of Peter H. Siebrand.)

A. I got another piece of iron.

Q. Can you take this hitch and show them what you did to it? Was this a permanent hitch?

A. A temporary hook-up.

Q. You took it there and left it there?

A. Yes.

Q. Did you look at the ball on the truck that day? A. Yes. [274]

Q. Was there anything wrong with it?

A. No.

Q. Show them if you can—there are two or three fellows here that are mechanics—show them what you did.

A. Replaced this part in here underneath (indicating).

A Juror: Was this gone?

The Witness: Yes.

A Juror: Was this gone?

The Witness: Yes.

Q. (By Mr. Wilson): And then you went into a blacksmith's shop, or something there?

A. Yes.

Q. And got the thing fixed? A. Yes.

Q. Did you know whose truck it was?

A. The GMC?

Q. The truck that was pulling the trailer?

A. Yes, I knew.

Q. Did you know whose trailer it was?

A. I know the general idea. Yes, I do know.

Q. You knew then? A. Yes.

Q. And it belonged to your cousin, Bill? [275]

(Testimony of Peter H. Siebrand.)

A. That is right.

Q. And did Carroll request you to help him?

A. He did.

Q. You left the trailer and Carroll in Mesa? Or do you remember? A. Yes.

Q. Did you see Carroll on that day prior to the time you saw him on the bridge? A. No.

Q. Were you at the lot, at the circus winter quarters lot, on that day?

A. In the morning, yes.

Q. Did Carroll request of you any consent or permission, or anything, to drive this truck?

A. No.

Q. When did you last see the truck before you saw it on the bridge?

A. Well, it was sitting back in the back of the lot.

Q. The winter quarters lot? A. Yes.

Q. Do you know of anyone that had the authority to drive this truck?

A. I don't know. I probably would.

Q. Other than Pete, and Hiko, and you?

A. Yes. [276]

Q. Was Bill's truck there on the lot, too?

A. Well, I couldn't say for sure, because I was up town at the time.

Q. Did Bill keep his stuff on the lot there, too?

A. Yes, he did.

Mr. Wilson: You may examine.

(Testimony of Peter H. Siebrand.)

Cross-Examination

By Mr. Mahoney:

Q. Mr. Siebrand, you say that you happened along on the bridge and saw this accident, is that correct? A. That is right.

Q. You more or less took over the job of getting this trailer over to Mesa, is that correct?

A. I didn't have to do that. The policemen were right there.

Q. You took over the job of getting the trailer over to Mesa?

A. I didn't move it off of the bridge.

Q. You did move it from a place in Tempe over to Mesa, did you not? A. That is right.

Q. And you overlooked and took charge of that operation, is that correct? [277]

A. That is right.

Q. Who are you employed by?

A. By the Siebrand Brothers.

Q. By P. W. and Hiko, is that correct?

A. Yes.

Q. You were the one that took that trailer on from Tempe to Mesa, is that right?

A. That is right.

Mr. Mahoney: That is all.

Redirect Examination

By Mr. Wilson:

Q. Why did you do that?

Mr. Mahoney: I object on grounds it is immaterial, your Honor.

(Testimony of Peter H. Siebrand.)

The Court: He may answer.

Mr. Wilson: I think it is immaterial, too.

Mr. Mahoney: Why ask the question, then?

Mr. Wilson: That is all.

(Witness excused.)

The Court: We will suspend until ten in the morning.

Keep in mind the Court's admonition.

(Whereupon, at five o'clock p.m., an adjournment was taken until ten o'clock a.m. of the following day, April 15, 1954.) [278]

Thursday, April 15, 1954; 10:00 A.M.

(Court convened pursuant to adjournment.)

(Present: Same as before.)

The Court: Call your next witness.

Mr. Wilson: I will call P. W. Siebrand.

P. W. SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are P. W. Siebrand, one of the defendants in this case? A. Yes, sir.

Q. Where do you live, Mr. Siebrand?

A. 2709 North 24th Place.

Q. Is that your home?

(Testimony of P. W. Siebrand.)

A. Yes, sir. [279] That is in Phoenix.

Q. Do you own it? A. Yes, sir.

Q. How long have you lived there?

A. About six years.

Q. Does your brother, Hiko Siebrand, have a home here? A. Yes, sir.

Q. Does he live here? A. Yes, sir.

Q. Where does he live?

A. On Montebello.

Q. Who owns Siebrand Brothers Carnival and Circus? A. Hiko Siebrand and myself.

Q. Does anyone else have any interest in it at all? A. No.

Q. Is it a corporation? A. No.

Q. Is it a partnership? A. Yes, sir.

Q. Where do you winter quarter the circus?

A. 2307 East Van Buren.

Q. Do you own that property?

A. Yes, sir. [280]

Q. How long have you owned it?

A. About ten years.

Q. Who operates the circus? Who manages it?

A. We both do it together.

Q. What are his duties?

A. He takes care of the office, and I do most general, almost anything.

Q. What does the carnival and circus consist of?

A. The vaudeville and circus consists of riding devices, a circus performance, and some side shows, and we let out on commission or rental basis the concessions.

(Testimony of P. W. Siebrand.)

Q. About how many concessions do you have?

A. It varies from, oh, it might vary from fifteen to—at different fairs it might go up to a hundred, or even more.

Q. How long have you been dealing with concessionaires? A. About 40 years.

Q. Has the basis on which you have dealt with them changed during that time? A. No.

Q. What is the basis upon which you deal with them?

A. Well, it is based on paying a rental fee [281] on a basis of their gross, in some instances. In some instances it is just a flat rental. And other places—it may be at a fair where the fair gets considerable, and these concessions can sometimes do business directly with the fair, themselves, and sometimes they rent space from us.

Q. Was William R. Siebrand a concessionaire upon your show during the year prior to the accident? A. Well, he had been in 1952, yes.

Q. And then after the accident, was he a concessionaire during that season upon your show?

A. Yes.

Q. And he is your nephew? A. Yes, sir.

Q. And does he have any ownership or control of the circus and carnival?

A. None whatever.

Q. Does he participate in the profits in any way?

A. No, sir.

Q. Does he participate in the losses in any way?

A. No, sir.

(Testimony of P. W. Siebrand.)

Q. What kind of a concession did he operate on your show in the year prior to the accident?

A. Oh, they had different kinds of [282] concessions. I don't know whether anybody understands. We had games with dolls, or novelties, or birds.

Q. I am talking about Bill.

A. Yes. He had some birds one year, and he had other things.

Q. In the year prior to the accident, what was the basis of your letting him, or having him on your show?

A. As a concessionaire.

Q. Under the terms which you mentioned in general?

A. Yes.

Q. Did you make, and have you ever made any different deal with William R. Siebrand because he was your nephew?

A. No.

Q. How long has he been back from the army?

A. He came back in the summer of 1946, and he didn't do anything. He was with the show, but he didn't do no—take no part in it one way or other, even with a concession. He was in some trucking business before he went to the army, and he was with the show as a kid way back. But then he was gone about 10, 12 years, and he wasn't here at all.

Q. Was he before the accident an employee of the circus and carnival? [283]

A. No. He helped us sometimes during the winter in repairing.

Q. Where?

A. On Van Buren Street.

Q. Now, on the day of the accident, was Bill Siebrand an employee of the Siebrand Brothers

(Testimony of P. W. Siebrand.)

Circus and Carnival? A. No.

Q. Was he employed by you or Hiko privately for any purpose? A. No.

Q. Were you in business on that day?

A. We hadn't opened the show. We was going to open it the next day.

Q. Where? A. At Mesa.

Q. How long have you been at the Mesa opening, Mesa show?

A. Well, we brought our equipment over there, the rides, they brought them over about Tuesday and Wednesday, and they set them up, and it is always, with the first opening, a lot of work to put them up, so we bring them over early, and we had them all out there about Wednesday.

Q. What kind of a place is that at Mesa? Is that a fair? [284]

A. It is. They call it a fair. They have a big exhibit building there, and a lot where they put on some tents for exhibits.

Q. How many years have you had that fair?

A. Six years, I think, ever since it opened.

Q. Was Bill Siebrand's concession on your show on the day of the accident? A. No, sir.

Q. Was it on your show the day after the accident? A. No, sir.

Q. And later on it was on your show?

A. Yes, sir.

Q. Do you know Mr. Carroll sitting at the table?

A. Yes, sir.

Q. And how long have you known him?

(Testimony of P. W. Siebrand.)

A. Well, I know him first, I think, in 1948. He was on the show with a concession for, oh, maybe four or five weeks, and then he was back again. And then he went to Alaska, was there with a concession a couple of years, and then in the fall he came back from Alaska, and he was with his concession on our show again.

Q. On the day of the accident was Carroll working for you? A. No, sir. [285]

Q. Did he work for you the day before the accident? A. No, sir.

Q. Did he work for you the day after the accident? A. No, sir.

Q. Did he ever work for you? A. No, sir.

Q. By you, I mean you and Hiko, who own and operate the Siebrand Circus and Carnival?

A. No, sir.

Q. Nor you privately or individually?

A. No, sir.

Q. Nor Hiko privately and individually?

A. No, sir.

Q. Was he a friend of yours of any association in particular?

A. Well, other than being acquainted with him and having a concession on our show.

Q. The same as other people? A. Yes.

Q. Did Carroll ever drive a truck for you on the day of the accident?

A. Other than taking this truck that morning. he has not, no.

(Testimony of P. W. Siebrand.)

Q. I didn't understand you. [286]

A. Other than he took that truck by mistake, or wrongfully, on the morning of the accident.

Q. I say, did he drive that truck for you?

A. No, no. Just took it.

Q. Where was the truck?

A. On the ground there.

Q. What ground?

A. 2307 East Van Buren, our circus ground.

Q. What color was the truck? A. Red.

Q. Was it a pick-up truck or flat track?

A. Pick-up red truck, GMC truck.

Q. Did Bill Siebrand have a pick-up truck?

A. Yes. It is a Ford.

Q. Where was it on the day of the accident?

A. On the ground there.

Q. Did you give consent to Carroll to drive this truck to pull Bill Siebrand's trailer?

A. No, sir.

Q. Did anyone ask you for consent?

A. No, sir.

Q. Did you give Bill Siebrand consent to drive that truck? A. No, sir.

Q. Does Bill Siebrand have an understanding—rather, does he have a standing or running consent to [287] drive, to use your trucks? A. No, sir.

Q. I mean, did he at that time?

A. No, sir.

Q. Were you in any wise interested in whether Bill Siebrand's trailer got to Mesa or not?

A. No.

(Testimony of P. W. Siebrand.)

Q. Why not?

A. Well, in the first place, they didn't have it ready.

Q. What do you mean, they didn't have it ready?

A. They didn't have no birds, they said.

Q. He couldn't even have been a concessionaire because he had no way to operate, that is your statement?

A. No, he didn't.

Q. Did you need him on the show?

A. No, sir.

Q. Did you have all the concessioners you wanted at that time?

A. Well, there is no set rule about it. You just have what you have.

Q. When did you first find out that he drove this truck?

A. The first I found out, I was home, and my son called that there had been an accident, and [288] that our truck was in it, that Carroll had taken the truck.

Q. You heard the officer say that he asked Carroll what his occupation was, and Carroll told him that he was a truck driver for Siebrand Brothers?

A. Yes.

Q. Is that true?

A. No, sir.

Q. Do you have any truck drivers who move your circus and carnival?

A. Yes.

Q. Are they solely truck drivers, or do they engage in other activities?

A. Well, they work on the rides.

(Testimony of P. W. Siebrand.)

Q. And as such, exclusively, you don't have any truck drivers? A. No.

Q. Who drives the truck, for example, taking the Ferris Wheel, one of the Ferris wheels from one town to the other?

A. Well, we have the operator of the Ferris Wheel. He generally drives the ride. He operates on the truck. It is not always absolute, because he could be driving another truck, and somebody else would drive the one he had the ride on.

Q. Did you have a sign on Bill's trailer [289] saying Siebrand Brothers Circus and Carnival?

A. Yes.

Q. Did you have such a sign on other trailers that didn't belong to you?

A. Yes, there was several signs on different trailers.

Q. How long have you been doing that?

A. Oh, not very long, maybe four or five years, something like that.

Q. You pay for putting the sign on?

A. We generally pay for the—we have a permanent painter, and we have him put it on there, if they want it on there. If they don't want it on there, we don't put it on.

Q. Do you have any ownership or interest in this trailer involved in this accident?

A. No, sir.

Q. Did you at the time of the accident?

A. No, sir.

Q. Did you ever have? A. No, sir.

(Testimony of P. W. Siebrand.)

Q. Was that trailer parked on the winter quarters? A. Yes, sir.

Q. Are there other trailers parked on the winter quarters? [290] A. Yes, we have.

Q. What kind of trailers?

A. Different trailers, concession trailers, baggage trailers, house trailers.

Q. How big is the winter quarter lot?

A. Five acres.

Q. Do you engage in any sort of community welfare or public work in this community?

Mr. Mahoney: I will object to that on the grounds it is immaterial.

The Court: Yes.

Mr. Wilson: I think it is material from the standpoint, your Honor, of being a foundation for the interest that he showed in the Gossnells, is what I had in mind.

Mr. Mahoney: That is a little remote, your Honor.

The Court: I think so.

Q. (By Mr. Wilson): Did you show an interest in the welfare of the Gossnells? A. Yes, I did.

Q. How long after the accident before you—how long after you heard about it before you started to see them?

A. I was there within two hours. [291]

Q. Where were you when you heard about it?

A. Home.

Q. Had you been on the lot that day?

A. No.

(Testimony of P. W. Siebrand.)

Q. On the winter quarters, I mean?

A. No.

Q. What did you do about the Gossnells?

A. I went to the hospital and I met Mrs. Gossnell, and I talked with her, and asked her if she needed any assistance, if she knew anybody in town of any kind, and if I could do anything for her, I would.

Q. What day was that?

A. The first day. She told me she knew one person, Mr. Clark.

Q. What is his name?

A. Clark. And he was on his way down there, or she had called him.

Q. Down where?

A. To Phoenix, or Tempe.

Q. From where? A. From Tucson.

Q. Did she say who he was? A. Clark.

Q. No, but I mean, he was a friend of theirs, or any relationship with them?

A. That is the only one she said she knew. [292]

Q. Did you see Mr. Gossnell?

A. No. He was not able to be seen that day, is what they told me.

Q. When the accident was reported to you, was he reported in critical condition? A. Yes.

Q. You heard Mrs. Gossnell testify that you saw her on another occasion other than that day?

A. I saw Mrs. Gossnell twice, I think.

Q. Do you know the next time you saw her?

A. I saw her on Thursday.

(Testimony of P. W. Siebrand.)

Q. Which Thursday?

A. The following Thursday.

Q. What day was the accident on?

A. It was on Friday.

Q. Was there more conversation between you and Mrs. Gossnell on the day about this fellow Clark?

A. No, other than that he was coming to Tempe, and she said that he would come over and see me.

Q. Now, when did you first see a lawyer about the accident?

A. When I come back and saw Mrs. Gossnell, I saw Mr. Mahoney and Cracchiolo come from the hospital, out of the building.

Q. That isn't what I meant. I meant, when did you first consult a lawyer about your [293] situation?

A. Immediately.

Q. On the day of the accident?

A. Yes.

Q. And did you conduct any investigation as to the cause and the manner in which the accident occurred?

A. Yes.

Q. When?

A. Friday afternoon and Saturday, as soon as I was available and could come back from the hospital.

Q. Did you see Clark?

A. Yes, sir.

Q. It has been testified there was another man in the car with the Gossnells; did you ever see him?

A. Yes.

Q. When did you see him?

A. I saw him the day of the accident.

(Testimony of P. W. Siebrand.)

Q. Where? A. At the hospital.

Q. Talk to him? A. Yes.

Q. What did you talk to him about?

A. Oh, we just said a few words. He didn't seem to be much interested in anything.

Q. Did you learn who he was, or what he was doing with them, or anything? [294]

A. I understand he was a writer.

Q. Was he there when you were with Mrs. Gossnell? A. No.

Q. Where did you talk to Mrs. Gossnell the first day? A. In the corridor of the hospital.

Q. She came out there and talked to you?

A. Yes.

Q. When did you see Clark?

A. Saturday afternoon he came to Mesa.

Q. Now, was anybody with him?

A. I don't think so. There might have been.

Q. You don't know?

A. I didn't see nobody that I could remember.

Q. Where did you talk to him?

A. He came to the office, but I wasn't in the office, so my daughter took care of the office. They sent for me and I came to the office again.

Q. Where was that? A. In Mesa.

Q. What kind of an office did you have in Mesa?

A. We have got a large trailer office that is built on a semi-trailer.

Q. When you came into the trailer, was he already in the trailer? [295] A. Yes.

(Testimony of P. W. Siebrand.)

Q. And as far as you know, nobody was with him?

A. I can't say there was not. There was quite a few other people, and we got working in the office.

Q. Was Hiko there? A. No.

Q. Where was he?

A. I think he was home.

Q. Now, what did Clark say to you?

A. Well, we just talked about the Gossnells, if they was in distress, or needed anything. There wasn't much more said about the thing.

Q. Can you say what he said?

A. Well, just talked about the accident, and I was sorry that it happened, and I says to him, if we couldn't do anything for them, we certainly would like to do something for them, and I was very much interested that they would get the right kind of medical care, because they were strangers and didn't know nobody in the community.

Q. Had you talked to Mr. Carroll prior to the time you talked to Mr. Clark?

A. No. Very few words.

Q. I mean, had you seen him since the accident?

A. Yes.

Q. Where did you see him? [296]

A. I saw him, I think, in Tempe.

Q. Have you seen this Clark since that Saturday? A. No.

Q. Now, I asked you what he said to you, and you told us something of what you said to him. Now,

(Testimony of P. W. Siebrand.)

was there more that you said to him than what you have told us?

A. No, nothing, only talk about the Gossnells, their welfare. That is about all.

Q. Did he tell you they needed something, or didn't need something?

A. Well, he didn't know. Mr. Gossnell couldn't be talked to, and he finally decided, just leave it go, see what happens.

Q. Did he seem to know the Gossnells well?

A. He indicated that.

Q. Do you know that this Clark's deposition was taken in Fort Dodge a few days ago? A. Yes.

Q. And you know that he wasn't here at the first trial? A. No.

Q. I show you a portion on page 7 of the deposition of Fred Clark, on page 8, rather, wherein Clark says that he said to you: "I understand you wish to see me." [297] A. I didn't say that.

Q. He says he said it when he came in.

A. He might have said that, but I didn't ask him to come.

Q. You didn't ask him to come there?

A. No. But Mrs. Gossnell said he would come to see me.

Q. Then he says that you said: "I do. I am sorry about this accident." A. Yes, sir.

Q. Did you say "I do"?

A. Yes. No, no. He just came in, and he says, "to see about the accident." I says, "I am surely

(Testimony of P. W. Siebrand.)

sorry that that happened." I says, "Are you a friend of the Gossnells?" He says, "Yes."

Q. He says, "I told him Mrs. Gossnell said that you wanted to see me."

A. No. Mrs. Gossnell said he would come to see me.

Q. And he says that you said you were so sorry about the accident, and "he was going to stand all damages and would buy them a new car at once, because theirs was wrecked beyond repair."

A. No, sir.

Q. Did you say anything to that effect?

A. No, sir. [298]

Q. Was there any such conversation?

A. No, sir. We was concerned with Mr. Gossnell, because he might die.

Q. Was there any discussion about whether or not you were liable for the accident?

A. No, sir.

Q. Had you determined prior to this by legal consultation whether or not you were liable for the accident?

Mr. Raineri: I object to that, your Honor. That is self-serving.

The Court: Well, he might have had advice.

Mr. Raineri: It is self-serving. They can say what they want to. It is a conclusion.

The Court: Well, he consulted his counsel and reached a conclusion based on what his lawyer told him.

The Witness: Yes.

(Testimony of P. W. Siebrand.)

Q. (By Mr. Wilson): Have you ever been confronted with any such statement as that from Mr. Clark, in person? A. No, sir.

Q. Were you confronted with any such statement as that in the first trial? A. No, sir.

Q. He says on page 9: "We walked about [299] the circus display, and he said it was just a winter showing of their show, and that they did not start on the summer tour until later in the winter or early spring."

Did you walk about the show with him and say anything of that sort?

A. I don't think we was—I don't think I went out of doors, but we might have talked about the show.

Q. You played this show for six years?

A. Yes, sir.

Q. And is it the first or the last showing?

A. First showing.

Q. Is it a winter showing or a spring showing?

A. Well, it is just a temporary opening of our show.

Q. Do you go on from there?

A. Yes. We reassemble in Phoenix.

Q. He says at page 9, in the center of the page: "He further stated that lawyers shouldn't be brought into the case, as they would settle between the Gossnells and himself."

Mr. Raineri: "They could settle."

Mr. Wilson: Thank you.

Mr. Raineri: Read the whole thing. [300]

(Testimony of P. W. Siebrand.)

Mr. Wilson: Now, let's don't have anything like that.

Mr. Raineri: If the Court please——

Mr. Wilson: I think you were calling my attention to the fact that I made an error.

The Court: Get along with this lawsuit.

Mr. Wilson (Reading): "He further stated that lawyers shouldn't be brought into the case, as they could settle between the Gossnells and himself, as he would stand all damages, and lawyers would drag it through the court for several years."

Q. Did you talk about that with Clark?

A. No, we didn't talk about no lawyers or suits. We were concerned with Mr. Gossnell's injuries, or being ready to die at that time.

Q. Why were you concerned with it?

A. I figured that some way or other I would get involved in it.

Q. How? What do you mean?

A. Because, in the first place, on account of the, of my truck being used in there.

Q. Now, did anybody ever, on the Gossnell side, say to you that—at any other time, either prior, or in this courtroom, or last year, that you had at any time agreed to stand all damages and buy them a new [301] car?

A. No.

Q. Or anything to that effect?

A. No, sir.

Q. Or that you had ever admitted any liability or made any offer of settlement?

A. No, sir.

Q. Now, let's see. This was the day following the accident, is that correct?

(Testimony of P. W. Siebrand.)

A. Yes, sir, afternoon following.

Q. The afternoon of the day following the accident?

A. It is about 24 hours, 26 hours after the accident.

Q. Now, you heard this deposition read into evidence yesterday? A. Yes, sir.

Q. Now, did you see Mrs. Gossnell after you talked to Clark? A. Yes, the next Thursday.

Q. The next Thursday? A. Yes.

Q. Where? A. At the hospital.

Q. Who was with you?

A. Dorothy Dalton and Mr. Carroll. [302]

Q. And did anyone else accompany you to the hospital?

A. Well, you did, but you didn't go inside.

Q. Where had we been?

A. We was to Tempe.

Q. And did you see anybody else at the hospital besides Mrs. Gossnell?

A. I saw Mr. Mahoney, Mr. Cracchiolo, the party that rode in the car with the Gossnells, leaving the hospital.

Q. Now, did you have a conversation with Mrs. Gossnell? A. Yes, very little after that.

Q. Where was it?

A. In the corridor of the hospital.

Q. Who was there?

A. Dorothy Dalton and Mr. Carroll.

Q. And did you say to Mrs. Gossnell that this was Mr. Carroll who was driving the truck?

(Testimony of P. W. Siebrand.)

A. No. I don't even know they ever was introduced. Dorothy Dalton, we all three come in, and she started talking to Mrs. Gossnell.

Q. What about?

A. About the accident, and sorry about the thing happening. We just all three talked.

Q. Well, the question is, did you say this [303] thing to her, that this was Carroll who drove the truck?

A. I told her that was Mr. Carroll that drove the truck.

Q. You said that to Mrs. Gossnell?

A. Yes.

Q. Now, you heard her testify from the stand that she said that you said, "This is Mr. Carroll who drove the truck for us, and I just wanted you to meet him"? A. No, sir.

Q. Did you say anything to that effect?

A. No.

Q. This was Thursday, a week after the Friday, the day that the accident occurred? A. Yes.

Q. How long were you there?

A. Oh, maybe ten minutes.

Q. Did you offer to help them, or ask them if they needed help at that time, or inquire further about their welfare?

A. Yes, I asked them if they was in any need at all, and if they knew they had a good doctor.

Q. Do you know why Dorothy Dalton went over there?

(Testimony of P. W. Siebrand.)

A. I understand that she was acquainted with Gossnells. [304]

Q. That Dorothy Dalton was? A. Yes.

Q. Who was she? Who was Dorothy Dalton?

A. She was your secretary.

Q. Now, did you ever talk to Mrs. Gossnell after that Thursday? A. No.

Q. Did she tell you on that day that Mr. Mahoney represented her?

A. She didn't say nothing.

Q. About that? A. No.

Q. Did she tell you that anybody represented her? A. No.

Q. Did you ever see Mr. Gossnell prior to seeing them in this courtroom? A. No, sir.

Q. Did anyone ever come to you at any time, including Clark, and ask you to make a settlement in connection with this case? A. No, sir.

Mr. Raineri: If the court please, that is a misstatement of the evidence. Mr. Clark didn't ask for any settlement at all. In fact, he never mentioned settlement, his deposition doesn't. That is [305] a misstatement of the evidence.

The Court: It may stand.

Mr. Wilson: I don't know what he is talking about.

The Court: I don't either.

Q. (By Mr. Wilson): Did you ever examine the trailer hitch on Bill's trailer that was involved in the accident, before the accident? A. No.

Q. Did you ever drive the red pick-up truck

(Testimony of P. W. Siebrand.)

that Carroll drove that belonged to you and Hiko that day? A. No.

Q. Have you seen it? A. Yes.

Q. Before the accident, I mean? A. Yes.

Q. You knew you had it? A. Yes.

Q. How many trucks do you have?

A. Thirty-five.

Q. Are you actively, and were you at that time actively in charge of this show, or do you have somebody else run it?

A. No, I am mostly in charge of the show.

Q. I couldn't understand you. [306]

A. I am in charge of the show.

Q. You work there? A. Yes.

Q. When the shows open? A. Yes.

Q. I mean all during the time it is open?

A. Not all the time. Most of the time. I am in active duty either with it or away from it.

Q. Is there anybody under you that has the authority that you have?

A. My brother, or my son.

Q. Hiko? A. Yes.

Q. And Little Pete? A. Yes.

Q. Did Little Pete tell you what he had done about the trailer when he called you up, and about the truck?

A. Yes, he told me that he got it fixed, and he took it to Mesa, and Carroll was with him. He left his car in Tempe, and brought the driver back to drive that.

Q. Do you know of any way on earth that you

(Testimony of P. W. Siebrand.)

are associated with Bill Siebrand to the extent of being liable in any way for the actions of Carroll?

A. No, sir. [307]

Q. Or any way that you are associated with Carroll that would make you liable for his actions?

A. No, sir.

Mr. Wilson: You may examine.

The Court: We will have our morning recess at this time.

(A recess was had.)

The Court: You may proceed.

Cross-Examination

By Mr. Raineri:

Q. Now, Mr. Siebrand, you did go over to the hospital to see the Gossnells, didn't you?

A. Yes, sir.

Q. And you did talk to Mr. Carroll out at Mesa in your office, isn't that right? A. Yes.

Q. And you were over to see the Gossnells more than once? A. Twice.

Q. In the hospital at Tempe?

A. Twice, yes.

Q. And the second time that you went over there, why, you brought your attorney with you, and you also had your attorney bring his secretary with him, isn't that right? A. Yes. [308]

Q. Now, after this accident happened on this particular 20th day of February, 1953, your son, P. W. Siebrand, called you up right away, didn't he?

(Testimony of P. W. Siebrand.)

A. Yes, sir.

Q. And he told you that the accident happened, didn't he? A. Yes, sir.

Q. Now, on those occasions that you went over to see the Gossnells at the hospital in Tempe, you at no time brought William Siebrand, the owner of the trailer, with you, did you?

A. He wasn't there.

Q. I say, you didn't bring him over with you, did you? A. No, I did not.

Q. All right. Now, you made a report of this accident to the State, didn't you, under the financial responsibility act? A. My attorney did, yes.

Q. And you signed it, didn't you?

A. I don't know whether I did or not. I guess I must have.

Q. Yes. You didn't have William Siebrand make any such report, did you, or have him sign that report? A. No, sir. [309]

Q. I show you Plaintiffs' Exhibit 2 so marked for identification, and ask you what that is, if you know? A. That is my card.

Q. And who did you give that card to?

A. I give it to Mrs. Gossnell when I introduced myself to her.

Q. Did you give her this card and tell her, "Have Mr. Clark come over"?

A. No, I said nothing about it.

Q. And, "This is my card"?

A. That is before I knew anything about Clark.

Q. You didn't do that at all? A. No.

(Testimony of P. W. Siebrand.)

Q. Or you didn't give Mr. Clark a card, did you?

A. I don't remember whether I did or not.

Q. Didn't you ask the Gossnells if they had any friends here at all? A. Yes, sir.

Q. And didn't they tell you that they had a friend by the name of Mr. Clark that was coming?

A. Yes. And he would come and see me.

Q. Didn't you tell the Gossnells that you would like to talk to Mr. Clark, and have him come over to see you?

A. Mrs. Gossnell said that Mr. Clark will [310] come and see you.

Q. You didn't ask for Mr. Clark to come over and see you?

A. No. I didn't know who Mr. Clark was, or what he had to do with it.

Q. Is your testimony here now that you did not give Mr. Clark that card?

A. I did not give it to him. I might have given him another one.

Q. But you don't deny that you gave him a card?

A. I gave him a card—I gave a card to Mrs. Gossnell, and if I did give one to Mr. Clark, I gave it to him when he came to see me.

Q. Now, you don't deny that you talked to Mr. Clark over at Mesa in your office?

A. He came to see me, and I talked with him.

Q. And you did have some talk with him there?

A. Yes.

Q. And you didn't tell him there at that time

(Testimony of P. W. Siebrand.)

that you would buy, or stand any damages, is that right? A. No, I should say not.

Q. You didn't have any talk of that kind?

A. No, sir.

Q. You didn't tell Mr. Clark, or did you have any talk with Mr. Clark about equipment of any kind? [311]

A. We talked about the two patients.

Q. No, I am asking you, did you talk to him about—— A. And if they needed assistance.

Q. You are not answering the question. Maybe I didn't make myself clear.

Did you talk to him, Mr. Clark, about any carnival equipment when he was over there at Mesa to see you? Did you talk to him about that?

A. I don't remember that. I wasn't in the office when he came, and I was sent for, and I went to the office. And we sat in the office and we talked about the fair, and different things about Iowa, because I originally came from there, and so did he. And Mr. Clark left, and I did not go with him.

Q. Did you during the course of that talk mention anything about the equipment that was being hauled from Phoenix over to Mesa?

A. I don't remember that.

Q. And didn't you tell Mr. Clark at that time, in accordance with what he said in his deposition, that your equipment was being hauled by that trailer from Phoenix over to Mesa?

A. No, sir.

Mr. Wilson: I object as assuming something not

(Testimony of P. W. Siebrand.)

in evidence. There is nothing in the deposition [312] that says it was Pete Siebrand's equipment.

The Court: Where did you find that?

Mr. Raineri: I have got it here on page—I will find it. Here is a question asked by your attorney——

Mr. Wilson: What page?

Mr. Raineri: Page 9. By your attorney.

Mr. Wilson: Is that the answer to what you are looking for?

Mr. Raineri: Here is one of them. There are two instances of where it was said, and I will find it, too. Here is one, page 9.

Mr. Wilson: What part of page 9?

Mr. Raineri: Bottom of the page.

Mr. Raineri (Reading): “Q. What, if anything, did he say about moving of their equipment at the time, as to the distance they were moving it?”

This question was asked by your attorney in Fort Dodge? A. I don't know him.

Q. (Reading): “The Witness: He talked about the equipment being at the Mesa Fair and was moving it from Phoenix, which is only 15 miles away.”

A. Yes, sir. [313]

Q. Did you tell him that?

A. I don't remember.

Mr. Wilson: I submit that that is not saying that his equipment was being hauled in this trailer.

Mr. Raineri: It sure is.

The Court: No. Well, I can't remember the exact words. He said he didn't make that statement.

(Testimony of P. W. Siebrand.)

Mr. Raineri: He denies it now.

The Court: Yes.

Mr. Raineri: But this witness says they did talk about it.

The Court: Go ahead. Let co-counsel find it. Go ahead with the cross-examination.

Q. (By Mr. Raineri): Page 10, the bottom of page 10:

“The Witness: He repeated several times about how sorry he was about the accident had to happen to the Gossnells with his equipment, and that he would stand all damages, and as I said before, buy them a new car at once, assuming that, I suppose, that Mrs. Gossnell could drive.”

Did you give that answer? A. No, sir.

Q. Now, you are the only one that owns the riding devices, you and your brother? [314]

A. That is right.

Q. In connection with that circus and carnival, is that right? A. Yes, sir.

Q. And you are the one that makes the arrangements for all of the rides or concessions that play under your show with the county at that particular fair grounds, is that right?

A. Yes. Not always. I sometimes have an assistant that does it for me.

Q. You did in this instance, though, did you?

A. Yes.

Mr. Raineri: That is all.

Mr. Wilson: That is all, Mr. Siebrand.

(Witness excused.)

Mr. Wilson: The defendants Siebrand rest.

Mr. Gibbons: If the Court please, in order to save time, may the record show that the defendant, S. J. Carroll, adopts as his defense the testimony of witnesses William Siebrand, Owen Kelly, and, of course, his own testimony?

The Court: All right.

Mr. Gibbons: And the defendant Carroll rests, your Honor, although at this time I would like to move that the deposition of the witness Clark be stricken and the jury instructed to disregard [315] it as to the defendant S. J. Carroll, on the previous grounds of the same motion, your Honor, that it was at a later time that the purported conversation related therein took place, and that the defendant S. J. Carroll was not present.

Mr. Wilson: I renew the same motions as to Hiko Siebrand.

Mr. Gibbons: Nothing in there that could be binding on him.

Mr. Mahoney: Sure they are connected. If the jury decides there is a connection there, this testimony would have probative value.

The Court: I think so. Any rebuttal?

Mr. Raineri: No rebuttal.

The Court: All right. Proceed with your argument.

Mr. Mahoney: We have one instruction.

The Court: Additional instruction?

Mr. Mahoney: Yes.

The Court: Do you have some more?

Mr. Gibbons: Yes, I have some more.

The Court: We will take a few minutes to look at your instructions. We will go in chambers. The Court will stand at recess for a few minutes.

(A recess was had.) [316]

(The following proceedings were had in the Court's chambers, out of the presence of the Jury.)

Mr. Wilson: The defendants, Peter Siebrand and Hiko Siebrand, move for a directed verdict in their favor and against the plaintiff, on the ground that there is no evidence of agency by which the jury could find that these defendants were in any wise liable for the accident that occurred, even if it was not unavoidable. And on the further ground that these defendants have shown by their clear and conclusive evidence, and the only evidence in the case, that Carroll drove the truck without their consent.

Mr. Gibbons: Let the record show that the defendant, S. J. Carroll, joins in the motion.

The Court: Motion denied.

Mr. Wilson: Now the defendants, P. W. Siebrand and Hiko Siebrand, further move the court at this time for ruling upon their objection to the deposition of Clark taken in Fort Dodge, Iowa, on the ground that even if the statements alleged to have been made by P. W. Siebrand are true, they are in no wise binding upon the partnership, nor upon Hiko Siebrand, individually, as they occurred after the occurrence that is the subject of the recovery. [317]

The Court: The motion will be denied. Do you want to join in that?

Mr. Gibbons: Yes. Let the record show the defendant Carroll joined in that motion.

The Court: All right. Motion denied. We will adjourn at this time until 1:30.

(Thereupon a recess was taken until 1:30 o'clock p.m. the same day.)

April 15, 1954; 1:30 o'Clock P.M.

Before Judge Ling and a Jury

(Court resumed pursuant to recess.)

(Present: Same as before.)

The Court: You may proceed with closing arguments.

(Whereupon counsel for plaintiffs and counsel for defendants presented closing arguments to the jury.)

The Court: I will excuse the jury until 9:30 tomorrow morning.

(An adjournment was taken until 9:30 a.m. the following day, April 16, 1954.) [318]

April 16, 1954; 9:30 o'Clock A.M.

(Court convened pursuant to adjournment.)

(Present: Same as before.)

Instructions to the Jury

The Court: It now becomes the duty of the court to instruct you as to the law that applies to this case.

The contentions of the parties, briefly, are these, as you have heard:

The plaintiffs were driving across the Tempe bridge and were struck by this trailer. Now, they claim that the driver of the truck that was drawing the trailer was negligent in the operation of the truck and trailer.

The defendants, on the other hand, the Siebrands, while it was their truck, they claim that Mr. Carroll had no authority or permission from them to drive this truck, and the trailer that you have heard belonged to William Siebrand. [319]

And Mr. Carroll, driver of the truck, claims that the accident was unavoidable.

Briefly, those are the issues.

Now, as I said, the action is predicated on negligence. Negligence is defined in the law as the doing

of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Before negligence can become actionable, it must be the proximate cause of the injury complained of.

Proximate cause is defined in the law as the cause of an injury which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

You are instructed that upon the plaintiffs rests the burden of showing by a preponderance of the evidence that it was the negligence of the defendants which caused the injury. Unless plaintiffs [320] make this proof, they cannot recover.

The mere surmise there may have been negligence on the part of the defendant, S. J. Carroll, or the mere fact that an accident happened to the plaintiffs, does not entitle the plaintiffs to a verdict.

You are further instructed that the mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action is negligent. In law we recognize what is termed as an unavoidable or inevitable accident. These terms do not mean literally that it was possible for such an accident to be avoided. It

simply denotes an accident that occurred, without having been proximately caused by negligence.

Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still no one can be held liable for injuries resulting therefrom.

You are instructed that the driver of an automobile or truck is not the insurer of the safety of others, and in case they exercise that degree of care for the safety of others which is prescribed by the statute, and such as an ordinarily prudent person would usually use under the same or similar circumstances, then they have discharged their [321] duty and are not lacking in ordinary care.

The section of the Arizona Code provides as follows:

“No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required by this section, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant, or any person upon the highway.”

You are instructed that if you find from a preponderance of the evidence—preponderance of the evidence as used in these instructions simply means the greater weight of the evidence. You are instructed if you find from the preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended, and did join their efforts in furtherance of the circus and

carnival show to be shown at the Maricopa County Fair in Mesa for their joint profit, then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant Carroll.

I further instruct you that if you find [322] from a preponderance of the evidence in this case that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same, then they may recover from the defendants, and your verdict would be for the plaintiffs.

You are instructed that if you find from a preponderance of the evidence that the act of the defendant Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested, then and in such event you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

You are further instructed that it is immaterial that the particular journey was a single transaction, or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand, or by William Siebrand, or by all of them jointly. The use of the truck and trailer as a part of a common business enterprise makes each of them responsible for the manner in which it is operated.

You are instructed that if the purpose of the journey from Phoenix to Mesa by the [323] defend-

ant S. J. Carroll was for the benefit of the owners of the truck or trailer, and for their joint benefit, and as part of a common business enterprise, the owners may under the principles of the law of agency be regarded as the masters of the driver, S. J. Carroll, even though no wages or reward were paid to him.

You are instructed that as between the parties themselves, the relationship of joint adventurers is a matter of intent and arises when they intend to associate themselves as such. There need be no formal agreement particularly specifying or defining the rights and duties of the parties. Such an agreement may be inferred from the conduct of the parties, or from facts and circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventure may be a promise, express or implied, to contribute capital or labor to the enterprise.

You are instructed that a duty rests upon every man in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured, he shall answer for the damages.

You are further instructed that the rule [324] of imputed negligence stemming from a joint enterprise rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the

enterprise are partners, or that each is an agent for the other.

You are instructed that we have under the law of this state a rule of evidence known as *res ipsa loquitur*. You are instructed that under and by virtue of this rule that where the thing which caused the injury complained of, in the instant case the truck and trailer driven by the defendant Carroll, is shown to be under the management of the defendants, or their servants, and the accident is such as in the ordinary course of things does not happen if those who have its management or control used proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care.

In other words, you are instructed that when such circumstances are shown to exist, the inference arises that defendants were guilty of negligence, and in the absence of explanation by defendants, justifies a recovery in damages by plaintiffs for such wrong, provided that you have found that [325] there was a common business enterprise existing among P. W. Siebrand, Hiko Siebrand, and William R. Siebrand.

You are instructed that under the law of this state, proof of ownership is *prima facie* evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner, and is using the vehicle in the business of the owner. And you are further instructed that it is not essential that the agency presumed from

proof of such ownership should be a business agency, or the service a remunerative service.

You are instructed that if you should find from a preponderance of the evidence that the defendants were guilty of negligence, and that this negligence was the proximate cause of the injury and damage complained of, then it will be your duty to go further and assess the damages in this case, and give plaintiffs what will reasonably compensate them, as shown by the evidence, for the injuries and damages sustained. And in arriving at that, you will take into consideration the permanent injuries sustained, loss of wages and earning capacity, pain and suffering, physicians' and nurses' bills, and hospital expenditures, if any; and the pain and suffering and medical expense which plaintiffs [326] in all probability and to a reasonable certainty may endure in the future, if any, taking into consideration age and life expectancy.

The mere fact I have instructed you on the measure of damages is no indication that the court thinks you should return a verdict for the plaintiffs. It is for you to determine who shall prevail in the action.

You are instructed that the creation of an agency relationship arises from the consent of the parties. It is not essential that any actual contract should exist, or that compensation should be expected by the agent, and the assent of the parties thereto may be either express or implied.

An implied agency is an actual agency. It is a fact which is to be proved by deductions or inferences from other facts and circumstances. If the

relationships exist which will constitute an agency. it will be an agency whether the parties understood the exact relationship or not.

You are instructed that when a person suffered injury from the negligent management of a vehicle, it is sufficient prima facie evidence that the negligence be imputed to the defendant, to show he was the owner of the vehicle, without proving affirmatively that the person in charge was [327] the defendants' servant or agent. It lies with the defendant to show that the person in charge was not his agent or servant, leaving him to show, if he can, that the vehicle was not under his control at the time, and that the accident was occasioned by the fault of a person for whose negligence the owner is not answerable.

The burden of proof is cast on the owner to show, if he can, the negligent driver was not his agent or servant.

You are instructed that if you find from a preponderance of the evidence in the case that the truck which was pulling the trailer at the time of the accident was being driven without the consent of the owners, then you must find for the defendants Siebrand and return your verdict accordingly.

You are instructed that an independent contractor is one who carries on an independent employment in pursuance of an agreement by which he has entire control over the work and the manner of its performance, as one who contracts to do a specific piece of work, furnishing his own assistance in executing the work in accordance with either di-

rectly his own ideas, or a plan previously given to him by the person for whom the work is done without being subject to the orders of the latter [328] with respect to the details of the work.

You are further instructed that should you find S. J. Carroll was an independent contractor and not an agent of William R. Siebrand in the operation of the bird store concession, then you must return a verdict for the defendants, P. W. Siebrand, Hiko Siebrand, and Siebrand Brothers Circus and Carnival.

You are instructed that William R. Siebrand was the owner of the trailer involved in the accident, and that the name Siebrand Brothers Circus and Carnival painted on the trailer does not of itself affect the ownership of William R. Siebrand in said trailer.

In judging of the evidence in this case, you are to give it a reasonable and fair construction. You are not authorized because of any feeling of sympathy or other bias to apply a strained construction, one that was unreasonable, in order to justify a certain verdict, and when, were it not for such feeling or bias, you would reach a contrary conclusion.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon the trial.

A witness is presumed to speak the truth. [329] This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character

for truth, honesty and integrity, or his motives, or by contradictory evidence.

In judging the credibility of the witnesses in a case you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, in every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration [330] of the evidence to the bald expression of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable persons.

There is nothing peculiarly different from the way a jury is to consider the proof in a civil case and that by which men give their attention to any question depending upon evidence presented to them.

First of all, you are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, any testimony which is ordered stricken out must be wholly left out of account and disregarded. [331]

The opinion of the judge as to any issue in the case is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in the instructions.

After you retire to your jury room, you will select one of your number to act as a foreman, and you will proceed with your deliberations. After you have agreed upon a verdict or verdicts, in the event you do, you will have the verdict signed by your foreman and returned into open court.

Any verdict agreed upon must be the unanimous verdict of the jury.

Forms of verdict have been prepared for your guidance. Omitting the title of the court and cause, one reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and assess their damages at dollars.”

The other reads, omitting the title of the court and cause:

“We, the Jury, duly impanelled and [332] sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendant, S. J. Carroll, and assess their damages at dollars.”

The other form reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and against the plaintiffs.”

The Fourth form reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the defendant, S. J. Carroll, and against the plaintiffs.”

Have I omitted anything?

Mr. Mahoney: No, your Honor.

Mr. Wilson: No.

The Court: All right, you may retire in the custody of the bailiff.

(Whereupon at 10:00 a.m., the jury retired to deliberate on its verdict.)

The Court: You may state your objections to the instructions, gentlemen.

Mr. Wilson: The defendants, P. W. [333] Siebrand and Hiko Siebrand, object to plaintiffs' instruction number 20, on the ground that it does not embrace all of the essential elements of the law of agency, nor is it supported by other and adequate instructions. And it has a tendency to mislead the jury by causing them to believe that this would be the only element—that the elements contained in 20 are the only elements of agency.

The defendants, P. W. Siebrand and Hiko Siebrand, object to plaintiffs' instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in the total essential elements to constitute an instruction in connection with the same, and particularly in connection with the failure to state that it is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise.

Specifically, that the defendants, Hiko Siebrand and P. W. Siebrand, object to plaintiffs' instruction number 5 so given by the court, on the ground that it is not supported by critical evidence.

The defendants, P. W. and Hiko Siebrand, [334] except to plaintiffs' instruction number 8 on the ground that it is not a correct statement of the law in such cases made and provided.

Defendants P. W. Siebrand and Hiko Siebrand

object to plaintiffs' instruction No. 11 on the ground that it is not a correct statement of the law, and is not supported by the evidence.

Mr. Gibbons: May the record show that the defendant, S. J. Carroll, joins in all of the objections?

The Court: All right. The court will stand at recess.

(Which was all of the evidence taken and proceedings had on the trial of the above-entitled cause.) [335]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 21st day of July, A.D. 1954.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed July 26, 1954. [336]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of George F. Gossnell and Estella Gossnell, his wife, Plaintiffs, vs. P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and S. J. Carroll, Defendants, numbered Civ-1875 Phx., on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries and docket entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries and docket entries constitute the record on appeal in said case, as designated in the Appellants' Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiffs' Amended Complaint.

2. Answer to Amended Complaint of Defendant S. J. Carroll.

3. Answer to Amended Complaint of Defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Bros. Circus and Carnival.

4. Minute entries of April 13, 14, 15 and 16, 1954 (proceedings of trial).

5. Verdict against Defendants P. W. Siebrand, et al.

6. Verdict against Defendant S. J. Carroll.

7. Plaintiffs' Requested Instructions.

8. Requested Instructions of Defendants P. W. Siebrand, et al.

9. Requested Instructions of Defendant S. J. Carroll.

10. Plaintiffs' exhibits 1, 2, 3, 4, 10, 11, 12, and 13 in evidence. (Plaintiffs' exhibits 6, 7 and 8 transmitted separately by express.)

11. Defendants' exhibits F and G, in evidence. (Defendants' exhibits A, B, C, D, and E transmitted separately by express.)

12. Stipulation that Defendants' exhibits B, C and E for identification be treated as if in evidence.

13. Clerk's Civil docket entry of judgment against Defendants P. W. Siebrand, et al., and of judgment against Defendant S. J. Carroll.

14. Reporter's Transcript.

15. Motion to Strike Portion of Judgment of Defendants P. W. Siebrand, et al.

16. Motion for New Trial of Defendants P. W. Siebrand, et al.

17. Motion for Satisfaction of Judgment of Defendant S. J. Carroll.

18. Minutes entry of May 17, 1954 (order denying motion to Strike portion of Judgment, Motion for New Trial and Motion for Satisfaction of Judgment).

19. Notice of Appeal of Defendant S. J. Carroll.

20. Bond for Costs on Appeal of Defendant S. J. Carroll.

21. Statement of Point on Appeal of Defendant S. J. Carroll.

22. Designation of Contents of Record on Appeal of Defendant S. J. Carroll.

23. Notice of Appeal of Defendants P. W. Siebrand, et al.

24. Bond for Costs on Appeal of Defendants P. W. Siebrand, et al.

25. Order approving Property (Supersedeas) Bond.

26. Supersedeas Bond on Appeal of Defendants P. W. Siebrand, et al.

27. Statement of Points on Appeal, of Defendants P. W. Siebrand, et al.

28. Designation of Contents of Record on Appeal of Defendants P. W. Siebrand, et al.

29. Order Extending Time to Docket Appeals.

I further certify that the originals of Plaintiffs' exhibits 6, 7 and 8 (X-rays) and of Defendants' exhibits A (X-rays), B, C, D and E (trailer hitches, ball joint and jack) have been transmitted sepa-

rately by express, as a part of the record on appeal herein.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$4.00 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 2nd day of August, 1954.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14468. United States Court of Appeals for the Ninth Circuit. P. W. Siebrand and Hiko Siebrand, Doing Business as Siebrand Brothers Circus and Carnival, Appellants, vs. George F. Gossnell and Estella Gossnell, His Wife, Appellees, and S. J. Carroll, Appellant, vs. George F. Gossnell and Estella Gossnell, His Wife, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
in and for the Ninth Circuit

No. 14468

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND, d/b/a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

STATEMENT OF POINTS ON APPEAL

The points upon which appellants, P. W. Siebrand and Hiko Siebrand, will rely on appeal are:

1. The Court erred in refusing to direct a verdict in favor of the above-named defendants.
2. There is no evidence that the defendants, P. W. Siebrand and Hiko Siebrand, were guilty of negligence.
3. The Court erred in that the verdict, decision and judgment are not justified by the evidence.
4. The Court erred in that the verdict, decision and judgment are not justified by the law and are contrary to the law.
5. There is not sufficient or substantial evidence tending to support the amount of the jury's verdict.
6. The verdict is excessive and appears to have been given under the influence of passion and prejudice.

7. The Court erred in the charge to the jury and in giving instructions requested by plaintiffs and objected to by defendants and failing to give instruction requested by defendants, P. W. Siebrand and Hiko Siebrand, upon objection by plaintiffs.

8. The verdict was founded upon surmise, conjecture, speculation and inference.

9. The Court erred in rejecting evidence offered by these defendants and objected to by the plaintiffs.

10. The Court erred in the admission of evidence offered by the plaintiffs and objected to by these defendants.

11. Irregularities in the proceedings of the Court, jury and prevailing counsel, whereby these defendants were deprived of a fair trial.

12. The Court erred in refusing to grant defendants, P. W. Siebrand and Hiko Siebrand, a new trial.

13. The Court erred in refusing to grant the motion of P. W. Siebrand and Hiko Siebrand to strike a portion of the judgment.

14. The Court erred in refusing to grant defendant, Carroll, motion for satisfaction of judgment.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for P. W. Siebrand
and Hiko Siebrand.

Receipt of copy acknowledged.

[Endorsed]: Filed August 6, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT ON APPEAL

The point upon which appellant, S. J. Carroll, will rely on appeal is:

1. The Court erred in refusing to grant Defendant Carroll's motion for satisfaction of judgment.

/s/ HOWARD W. GIBBONS,

GIBBONS, KINNEY &
TIPTON,

Attorneys for S. J. Carroll.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1954.

IN THE
**United States
Court of Appeals**

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND
BROTHERS CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

FILE

FEB - 4195

PAUL P. O'BRI

**Brief of Appellants, P. W. Siebrand and
Hiko Siebrand, Upon Appeal from
The United States District Court
for the District of Arizona**

W. FRANCIS WILSON,
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P. W. Siebrand and Hiko Siebrand.

Filed this.....day of February, 1955

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IN THE
**United States
Court of Appeals**

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND
BROTHERS CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

No. 14468

**Brief of Appellants, P. W. Siebrand and
Hiko Siebrand, Upon Appeal from
The United States District Court
for the District of Arizona**

*(Figures in Brackets refer to
page of the Transcript of Record)*

**Statement of Pleadings
and Facts Disclosing Jurisdiction**

On the 10th day of September 1953, the appellees George F. Gossnell and Estella Gossnell, his wife, filed a civil action in the United States District Court for the District of Arizona, Phoenix Division, wherein they allege the following jurisdictional facts: that the appel-

lees are resident of the State of Iowa (T.R. 3); that the appellants, P. W. Siebrand, Hiko Siebrand, and S. J. Carroll, are residents and citizens of the State of Arizona (T.R. 3). The appellees seek to recover damages from the appellants in the amount of \$111,215.00 (T.R. 5) for alleged injuries sustained from an accident which occurred on the bridge of Highway 60 and 70, near Tempe, Arizona, on February 20, 1953.

The pleadings, as above set forth, clearly allege jurisdictional facts sufficient to permit this suit to be filed in the District Court of Arizona, as authorized under the provisions of Title 28, Section 1332, U.S.C.A., which provides in part that the District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3000.00, exclusive of interest and costs, and is between citizens of different states. This appeal is properly filed in the United States Court of Appeals for the Ninth Circuit, pursuant to the provisions of Title 28, Section 1291, U.S.C.A., wherein it is provided in part that the Court of Appeals shall have jurisdiction of appeals from all final decisions of the United States District Courts of the United States. This appeal is from a final decision of a district court of the United States. Title 28, Section 1294, U.S.C.A., provides that the Ninth Circuit Court of Appeals is the proper circuit of the Court of Appeals to consider this matter.

Statement of the Case

For the sake of clearness in this brief, the appellants P. W. Siebrand and Hiko Siebrand will be known as "the defendants," and the appellees George F. Gossnell and Estella Gossnell will be known as "the plaintiffs."

The appellant S. J. Carroll will be known as "the truck driver."

The facts are as follows:

The plaintiffs, who are man and wife, were, on the 20th day of February, 1953, at about 10:30 in the morning, traveling Northwest on Highway 60 and 70 through the little town of Tempe, Arizona, and, at this particular time, they were proceeding on a bridge which crossed the Salt River near Tempe (T.R. 75). At the same time, the truck driver was proceeding with a truck and trailer in a Southeasterly direction on the same bridge. The truck driver was driving a truck which belonged to defendants (T.R. 204), which was pulling a trailer belong to William Siebrand (T.R. 248 & 250), the nephew of defendants, with the sign, "Siebrand Brothers Circus and Carnival" printed on the side (T.R. 256). As said parties approached each other, the trailer became disconnected from the truck and crossed the highway, and went head-on into the plaintiffs' car, and caused damage to the car and bodily injury to the plaintiffs.

Plaintiff George F. Gossnell was sixty-five (65) years of age at the time of the accident (T.R. 54). In addition to several cuts and bruises, the plaintiff George F. Gossnell received fractures of the fifth and eighth ribs on the left side, a compound fracture of the femur on the left leg, and a simple fracture of the fibula on the left leg (T.R. 146 & 147). The plaintiff George F. Gossnell was in bed in the court room throughout the entire trial, even though the defendants' doctor testified that the cast on his leg had been on for five months, without having it off for an examination, and that in his opinion, the fracture was healed (T.R. 189). The

injuries of the plaintiff Estella Gossnell were not serious. She had received bruises and a slight fracture of two ribs on the left side (T.R. 77). Plaintiffs claim medical and hospital expense in the amount of \$12,027.00 (T.R. 154).

The defendants testified that the truck which belonged to them was driven by the truck driver without their knowledge or consent; that the truck driver was not and never had been employed by the defendants (T.R. 291-292), and the trailer belonged to one William Siebrand, a nephew of the defendants (T.R. 248 & 250). The undisputed testimony is that William Siebrand, a concessionaire and an independent operator and business man, who had not gone with the show yet this year, was not under the control or supervision of the defendants (T.R. 288). The truck driver had, under the instructions of his associate, William Siebrand, secured a truck for the purpose of taking the William Siebrand trailer to Mesa, Arizona to join the show. In so doing, he secured the truck of the defendants of the same type and color, parked with the keys in it on the same lot, without the knowledge or consent of the defendants (T.R. 204-205), and attached it to the trailer of William Siebrand, and was proceeding to Mesa, Arizona to join the show. The truck driver testified that the trailer had bird cages and different frames for the concession (T.R. 219). Mr. Boyd, the policeman, testified that through a hole in the corner of a trailer, he ascertained that the trailer was carrying rides, concessions and stuff for a carnival (T.R. 142). The undisputed testimony is that the trailer and trailer-hitch had been examined shortly before the truck driver took the truck and trailer, and they were found to be in good mechanical condition (T.R. 207, 226 & 239). The plain-

tiffs introduced testimony, over the objection of the defendants, that the defendant P. W. Siebrand came to the hospital where the plaintiffs were staying following the accident and introduced truck driver S. J. Carroll as the man who was driving the truck for the defendants (T.R. 81 & 89). P. W. Siebrand said that he had said that Carroll was driving the said truck, and did not use the words "for us." (T.R. 305). At the end of the case, the jury found for the plaintiffs and assessed damages against the defendants in the amount of \$95,000.00. The jury assessed damages against the truck driver S. J. Carroll in the amount of \$100.00. After the motion for a new trial was denied, and before this appeal was taken, the said S. J. Carroll offered to settle the judgment against him, but was refused the right to satisfy said judgment, and the said judgment still stands; however, said S. J. Carroll paid the said sum of \$100.00 into court, where it is now.

We deem the pertinent questions to be decided on appeal, as raised by the facts of this case, to be as follows:

1. There was no evidence that the truck driver Carroll or the defendants P. W. Siebrand and Hiko Siebrand were guilty of negligence in any manner whatsoever.

2. There was no competent evidence adduced at the trial that the truck driver was the servant of the defendants, or that his negligence, assuming he was negligent, could in any way be imputed to the defendants.

3. The Court committed error in admitting evidence offered by the plaintiffs, over the objection of the defendants, in regard to the absence of safety chains.

4. The Court committed error in admitting the deposition of Fred Clark in evidence, when offered by the plaintiffs, in regard to certain statements made between defendant P. W. Siebrand and Mr. Clark, out of the presence of the other defendants, since there was no showing that P. W. Siebrand was acting for and on behalf of the other defendants.

5. The Court committed error in permitting the answer of plaintiff Estella Gossnell to remain in evidence over the objection of the defendants in regard to the statement that the truck driver Carroll "was driving the truck for us," without instructing the jury such evidence was not admissible against Hiko Siebrand, Siebrand Brothers Circus, and the truck driver.

6. The Court committed error in refusing to give certain instructions requested by the defendants Siebrand, and in giving certain instructions requested by the plaintiffs relating to joint adventure. This matter is more specifically set forth in the Specification of Errors.

7. The verdict of the jury and the judgment entered thereon against the defendants in the sum of \$95,000.00 and against the truck driver in the sum of \$100.00 are inconsistent and contrary to law.

8. The verdict against the defendants Siebrand in the sum of \$95,000.00 was excessive and unreasonable, and given under the influence of passion and prejudice.

9. The judgment against the truck driver in the sum of \$100.00 has been satisfied by the tender to the plaintiffs, and also into Court, of this amount of money.

Specification of Errors

I

The Court erred in denying the motion of the defendants for a directed verdict at the close of the case, for the reason that there was no competent evidence that the defendants, or their servant or employee, had been negligent in any manner whatsoever. There was no showing that the said defendants, or their servant, had done any act that they should not have done, or failed to do any act they should have done.

II

The Court erred in denying the motion for a new trial of the defendants, for the reason that there was no competent evidence that the defendants, or their servant or employee, had been negligent in any manner whatsoever. There was no showing that the said defendants, or their servant, had done any act that they should not have done, or had failed to do any act they should have done.

III

The Court erred in denying the motion of the defendants for a directed verdict at the close of the case, for the reason that there was no competent evidence showing that the truck driver Carroll was the servant of the defendants Siebrand at the time of the accident, or the servant of any person engaged in a joint enterprise with the defendants at the time of the accident. Thus, any negligence of the truck driver could not be imputed to the defendants Siebrand.

IV

The Court erred in denying the defendants' motion for a new trial upon the ground and for the reason that the verdict is contrary to law in that the jury returned a verdict against the defendants Siebrand in the sum of \$95,000.00, and a verdict against the truck driver in the sum of \$100.00. Such verdicts are contrary to law and inconsistent, in that any negligence of the defendants Siebrand must be derivative from the master-servant relationship, or as joint tort-feasors, and in either event, the verdict against the defendants could be no greater than the verdict against the truck driver.

V

The Court erred in refusing to grant the motion of the defendants to strike from the \$95,000.00 judgment all damages in excess of \$100.00, for the reason and upon the ground that the two verdicts are inconsistent and contrary to law in that any negligence of the defendants must be derivative from the master-servant relationship, and the judgment against the defendants could be no greater than the judgment against the truck driver.

VI

The Court erred in denying the defendants' motion for a new trial, for the reason that the verdict of \$95,000.00 against the defendants, the circus people, was excessive and unreasonable, and was given under the influence of passion and prejudice.

VII

The Court erred in admitting evidence by the plaintiffs in regard to the absence of safety chains (T.R. 238):

“Q Now, as far as chains on that truck, you don’t have any safety—

MR. WILSON: I object as being immaterial.

MR. MAHONEY: Immaterial? It is very material.

THE COURT: He may answer.

BY MR. RAINERI:

Q. You didn’t have any safety chains on that truck at all, did you?

A. No sir; I did not.

on the ground and for the reason that the Arizona law does not require safety chains and the inference to the contrary from the admission of testimony relating to the absence of safety chains was prejudicial to the defendants.

VIII

The Court erred in admitting the deposition of Fred Clark over the objections of the defendants (T.R. 104 & 105):

“MR. RAINERI: May the deposition be marked as Plaintiffs’ Exhibit 4 in evidence?

MR. GIBBONS: If the Court please, I would like at this time to move to strike the testimony of the previous witness, Fred Clark, as to the defendant, S. J. Carroll, since it purports to be a conversation which occurred several days after the accident, and not in his presence. It doesn’t even purport, your Honor, to bind him in any way whatsoever.

THE COURT: I will consider that. Go ahead.

MR. RAINERI: We will offer the deposition. It is marked Plaintiffs' Exhibit 4, and we will offer that in evidence.

MR. WILSON: If the Court please, may I object on behalf of Hiko Siebrand, on the grounds stated by Mr. Gibbons, on the ground it is not binding, a conversation occurring after the occurrence, and not in his presence?

THE COURT: All right.

MR. RAINERI: Is that received?

THE COURT: It is already in the record. I don't know what you want that for. It may be received.

THE CLERK: Plaintiffs' Exhibit 4 in evidence."

for the reason that the truck driver and the defendant Hiko Siebrand were not present at the time such statements were made and the power of a partner to act for the firm extends only to the transaction of partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm.

IX

The Court erred in admitting evidence offered by the plaintiffs over the objections of the defendants in regard to the statement of the plaintiff, Mrs. Estella Gossnell, wherein the defendant P. W. Siebrand was alleged to have introduced the truck driver Carroll as "the man who was driving the truck for him that day." (T.R. 81).

The evidence admitted is as follows:

“Q. On any of these occasions that Mr. P. W. Siebrand came over to see you, was anybody else ever with him?

A. Yes, he brought Mr. Carroll.

Q. Who is Mr. Carroll?

A. Mr. Siebrand introduced him as the man who was driving the truck for him that day, and he brought him over to meet us.

MR. WILSON: Just a monent. I object to the answer as not responsive, and I move it be stricken as prejudicial to this defendant. I had no warning that the answer could possibly be that.

MR. GIBBONS: May we have the time and place fixed your Honor, with reference to the defendant Carroll?

THE COURT: The answer may stand. Go ahead.”

for the reason that the power of a partner to act for the firm extends in general only to the transaction of the partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm.

X

The Court erred in refusing to give defendants' requested instruction No. 2, which reads as follows: (T. R. 35).

“You are instructed that a joint adventure is an association of persons to carry out a single business enterprise for a profit for which purpose they com-

bine their property, money, efforts, skill and knowledge. Each participant therein is agent for each of the others and it is essential that each have control of the means employed to carry out the common purpose.

“To constitute a joint adventure there must be more than the mere fact of a share in the profits of the business. One of the most important tests of a joint adventure is whether there is a share in the losses.”

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XI

The Court erred in refusing to give defendants' requested instruction No. 3, which reads as follows: (T. R. 36).

“You are instructed that parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence unless there is a community of interest in the undertaking and an equal right to govern and direct the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. In other words, in this case, in order to find that a joint adventure existed between William R. Siebrand, the owner of the trailer involved in the accident, and P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, you must find that William R. Siebrand had a voice and a right to be heard in the control and management of the circus and carnival and that the Siebrand Brothers had a voice and right to

be heard in the control and management of the bird store, operated as a concession by Carroll for William R. Siebrand.

“You are further instructed that in order to find that a joint adventure existed between the parties, last named, you must find that they had an agreement, express or implied, to share the profits and losses of the business and not an agreement for the payment of rent by William R. Siebrand to P. W. Siebrand and Hiko Siebrand, the owners of the Siebrand Brothers Circus and Carnival, and you must find that there was such an intent of each of the parties thereto to become joint adventurers and to exercise joint proprietorship and joint control of the circus and carnival and all the concessions so owned by the said William R. Siebrand.”

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XII

The Court erred in refusing to give defendants' requested instruction No. 4, which reads as follows: (T. R. 38).

“You are instructed that a mere rental agreement for the rental of space does not create a joint adventure even though the consideration for the rental is based upon percentage of the gross sales.

“Should you find that William R. Siebrand, in the operation of his bird-store concession, was merely renting space from P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and that the consideration for the rental of space was based upon a percentage of the sales made during the operation of the conces-

sion, then you must find that no joint adventure was created.”

on the ground and for the reason that such instruction is a correct statement of the law relating to joint adventure, is justified by the evidence in the instant case and the refusal to give such instruction was prejudicial to the defendants.

XIII

The Court erred in giving plaintiffs’ requested instruction No. 2, which reads as follows:

“You are instructed that if you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended and did join their efforts in furtherance of the Circus and Carnival Show to be shown at the Maricopa County Fair at Mesa for their joint profit, then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant S. J. Carroll. I further instruct you that, if you find from a preponderance of the evidence in this case, that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same, then they may recover from the defendants, and your verdict would be for the plaintiffs.”

The defendants objected to plaintiffs’ instructions on joint adventure and joint enterprise on the following grounds (T.R. 329):

“The defendants P. W. Siebrand and Hiko Siebrand object to plaintiffs’ instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in

the total essential elements to constitute an instruction in connection with the failure to state that it is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise.”

XIV

The Court erred in granting plaintiffs’ requested instruction No. 3 relating to joint adventures, which instruction reads as follows:

“You are instructed that joint adventurers are liable to third persons as partners for wrongful acts committed in conducting the joint enterprise, and each joint adventurer may be liable for the negligence of his associate or of any agent, servant, or employee of his associate joint adventurer, if the negligent act or conduct is within the scope of the joint undertaking. You are further instructed that with respect to a joint adventure involving the control and operation of a motor vehicle, all joint adventurers are liable for personal injuries suffered by others from the negligent operation of said motor vehicle including instances in which the actual negligence is that of agents and employees of the joint adventurers acting within the scope of the joint undertaking.”

Defendants objected to plaintiffs’ instruction No. 3 on the following grounds (T.R. 329, L: 9-21).

“The defendants P. W. Siebrand and Hiko Siebrand object to the plaintiffs’ instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in the total essential elements to constitute an instruction in connection with the failure to state that it

is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise."

XV

The Court erred in granting plaintiffs' requested instruction No. 5 relating to joint adventures, which instruction reads as follows:

"You are instructed that if you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested then and in such event, you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

"You are further instructed that it is immaterial that the particular journey is a single transaction; or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand or by William Siebrand or by all of them jointly; the use of the truck and trailer as a part of a common business enterprise makes each of them responsible for the manner in which it was operated."

Defendants objected to plaintiffs' requested instruction No. 5 on the following grounds (T.R. 329):

"Specifically, that the defendants Hiko Siebrand and P. W. Siebrand, object to plaintiffs' instruction Number 5 so given by the court, on the ground that it is not supported by critical evidence."

XVI

The Court erred in charging the jury as requested in plaintiffs' instruction No. 8, which reads as follows:

“You are instructed that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured he shall answer for the damage.

“You are further instructed that the rule of imputed negligence stemming from a joint enterprise, rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the enterprise are partners or that each is an agent for the other.”

The objection of the defendants to plaintiffs' instruction No. 8 reads as follows (T.R. 329):

“The defendants P. W. and Hiko Siebrand except to plaintiffs' instruction number 8 on the ground that it is not a correct statement of the law in such cases made and provided.”

XVII

The Court erred in denying the motion of the truck driver Carroll for satisfaction of judgment, after Carroll had paid the full amount of the judgment against him in the Court, for the reason that the Court was without authority to deny the satisfaction of such judgment after such amount was tendered into Court.

Summary of the Argument

It is the contention of the defendants that the District Court should have granted their motion for a directed verdict at the close of the plaintiffs' case, and at the conclusion of the entire case, for the reason that

there was no evidence that the defendants or their servant were negligent in any manner whatsoever.

It is urged that there was no competent evidence adduced at the trial tending to show that the truck driver was the servant or employee of the defendants, or that his negligence, assuming but without admitting that he was negligent, could in any way be imputed to the defendants.

Defendants assert that a verdict against the master in the sum of \$95,000.00, and a verdict against the servant in the sum of \$100.00, or against joint tort-feasors in like amounts, are inconsistent and contrary to the law, and cannot stand.

The verdict against defendants in the sum of \$95,000.00, in view of all the evidence and taking into consideration the ages of the plaintiffs, was excessive and unreasonable, and was given under the influence of passion and prejudice.

It was prejudicial to the defendants for the District Court to admit evidence offered by plaintiffs, over the objections of defendants, in regard to safety chains, when the State law does not require that safety chains be used.

Defendants contend that the District Court committed prejudicial error in admitting statements of defendant, P. W. Siebrand, made after the accident upon occasions when neither the truck driver nor the defendant Hiko Siebrand was present, without limiting the effect of such statements to the defendant P. W. Siebrand.

Defendants maintain that there was not sufficient evidence to warrant the District Court giving instructions concerning joint adventure, but assuming such evidence was present, the Court still erred in giving instructions on joint adventure which did not properly state the law on the subject.

The judgment against the truck driver in the sum of \$100.00 has been satisfied by the tender of such amount to the plaintiffs, and upon their refusal, to the Court, and the truck driver is entitled to a complete release from any liability under the judgment. And the satisfaction of a judgment against one joint tort-feasor is a satisfaction against all.

Argument

Proposition of Law No. 1

The doctrine of *res ipsa loquitur* does not apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible.

Specification of Errors Nos. I and II will be discussed in connection with the argument on the first proposition of law.

There was no evidence adduced at the trial that the defendants or the truck driver Carroll were negligent in any manner, or if negligent, that such negligence was the proximate cause of the injury to the plaintiffs. To establish negligence, the plaintiffs rely upon the doctrine of *res ipsa loquitur*. We submit that the facts in this case do not justify the application of the doctrine. The statement of law quoted above as proposition of law No. 1 is almost a direct quote from the Arizona

case of *Stewart v. Crystal Coca Cola Bottling Co.*, 50 Ariz. 60, 68 P. 2d 952.

In the *Stewart* case, a bottle of coca cola was sold by the defendant, Coca Cola Bottling Company, to the plaintiff Cynthia Stewart. The plaintiff put several bottles of coca cola in an ice box, covering them with ice water. About two hours later, the plaintiff reached in the coca cola box and moved the bottles around. One of the bottles exploded and a piece of glass struck the hand of the plaintiff and injured it. In discussing the doctrine *res ipsa loquitur* in this case, at Page 954 of the Pacific Reports, it is stated:

“This rule is merely one of evidence and is applicable only where the instrumentality causing the injury is under the control of the defendant and the accident is of such a character that in the ordinary course of events would not happen if those having control of it use due care.”

At Page 956 of the Pacific Reports, the court stated:

“Inasmuch, therefore, as it is just as probable the explosion was due to the action on glass of sudden changes in temperature, as it is that it was caused by an overcharge of gas or by a defective bottle, the rule of *res ipsa loquitur* does not apply. It is only where the existence of negligence is a more reasonable deduction from the facts shown that a plaintiff is permitted to call this rule to his aid. It ‘should not be allowed to prevail where, on proof of the occurrence, without more, the matter still rests on conjecture alone’.”

The Court in the *Stewart* case held that it is purely a guess whether the accident was due to an overcharge of gas or a defective bottle, either of which defendant

might be responsible for, or whether it was caused by the action on glass of a sudden change in temperature, which the defendant was not liable for. The court then said :

“And this being true, the following statement in *Biddlecomb vs. Haydon*, supra, is particularly pertinent: ‘Neither does it (*res ipsa loquitur*) apply where the cause of the accident is unexplained and might have been due to one of several causes, for some of which the defendant is not responsible’.”

The statement quoted from the *Stewart* case is likewise particularly pertinent to the case at bar. In the present case, it is truly and simply a matter of conjecture as to what was the cause of the accident in which plaintiffs were injured. The accident could have been caused by the manner in which the truck driver Carroll drove the truck at this particular time. There was no evidence that such was the case. The accident might have been caused by a defective trailer hitch on the trailer, which could have been ascertained by a careful examination. There is no evidence that this theory was the cause of the accident. As a matter of fact, the testimony is to the effect that an inspection was made and from all appearances, the trailer and trailer hitch were in good mechanical condition. (T.R. 239). The accident could have been caused by a latent defect in the trailer hitch, which was not visible and could not have been detected by a careful examination. This appears to be the most logical explanation of the accident, and of course, if this were the cause of the accident, then the defendants would not be liable for failing to discover a defect that could not be discovered by exercising reasonable diligence.

In the case of *Sawyer v. People's Freight Lines, Inc.*, 42 Ariz. 145, the plaintiff attempted to evoke the

aid of the doctrine of *res ipsa loquitur*. In the *Sawyer* case, an accident occurred between the defendant's truck and a horse upon which the plaintiff was riding, the place of the accident being a few feet north of the paved portion of the highway. In the course of the opinion, the court stated that where two objects come together in a collision while under separate control, the doctrine of *res ipsa loquitur* cannot be applied, and no inference or presumption that the collision was caused by one more than the other can be reasonably drawn. The court then quotes with approval, at Page 150 of the Arizona Reports, from *Wilbur v. Home Lumber Company*, 131 Ore. 180, 282 P. 236, and *Johnson v. Herring*, 89 Mont. 420, 300 P. 535, as follows:

“Where there are several persons or causes which might have produced the injury, some of which were under the control or management of defendant and others of which were under the control or management of the complaining party or of third persons, and the accident may have reasonably occurred by reason of acts for which defendant is not liable, the doctrine cannot be invoked. So the mere possibility that defendant's act could have caused the damage does not warrant the application of the doctrine, and the same is true where it is a matter of surmise or conjecture only that the damage was due to a cause for which defendant is liable.”

It is the contention of the defendants that the facts of this particular case do not fall within the *res ipsa* doctrine, since the cause of the accident can only be arrived at by surmise, conjecture or speculation, and when such is the case, the doctrine of *res ipsa* cannot be invoked to prove the necessary negligence required to be proved by the plaintiff.

Proposition of Law No. 2

To hold one person responsible for the acts of another on the theory that one is the master (employer) and the other is the servant (employee) there must be a showing that there was a contract between the parties which gives the master control of the details of the work of the servant. The master must have power to hire and dismiss the servant. The servant must perform the services provided for by the master, and there must be a provision for the compensation of the servant.

Specification of Error No. 3 will be discussed in connection with the foregoing proposition of law.

The law is clear that before one party can be held responsible for the acts of another on the theory of the master-servant relationship, a state of facts must exist which would embody all of the elements set forth in the foregoing proposition of law. This is a universally accepted rule. The law of master-servant is defined in 35 Am. Jur., p. 445, Sec. 2. In this discussion of the meaning of master and servant, it is pointed out that all of the elements mentioned herein must be present in order to make the "master" responsible for the acts of the "servant." The following citations are in point: *Buhler v. Maddison*, 267 Utah 267, 176 P. 2d 118; *Hinds v. Dept. of Labor and Industries*, 150 Wash. 230, 272 P. 734; 62 A.L.R. 225; *Ocean Accident and Guarantee Corp., Ltd., Insurance Carrier v. Charles D. Kennison, et al* 42 Ariz. 349, 26 P. 2d 113.

None of the elements of agency above set forth was established in this case. While it was shown that the truck driver was driving the truck of the defendants Siebrand, it was clearly shown from undisputed testimony, and there was no competent evidence to the con-

trary, the truck driver was driving the truck without the knowledge or consent of the defendants Siebrand. While it is the law of Arizona that the proof of ownership of an automobile is *prima facie* evidence that the driver thereof is a servant or agent of the owner, this presumption is overcome when undisputed testimony is shown that the driver is under the control or supervision of someone other than the owner. In this case the truck driver Carroll testified that he had taken the truck which was involved in the accident by mistake, and that he was not working for the defendants Siebrand, and in fact, was working for one William Siebrand, who is not a party to this action (T.R. 204).

The only evidence upon which it could be established that the truck driver was the servant of the defendants is, first, the alleged statement by the defendant P. W. Siebrand, when talking to the plaintiff Mrs. Gossnell, that the truck driver Carroll was introduced as "the man who was driving the truck for him that day" (T.R. 81). We respectfully submit that this evidence was incompetent and prejudicial to the defendants for the reason that the power of a partner to act for the partnership extends in general only to the transaction of partnership business, and admissions by a partner assuming to speak for himself are not evidence against the firm. This matter is more fully discussed under proposition of law No. 7.

Second, the testimony of the policeman Boyd that the truck driver informed him that he was employed by Siebrand Brothers Circus and Carnival (T.R. 127). This statement was purely hearsay and was incompetent to prove agency, since agency cannot be established by extra-judicial admissions, statements or declarations of the agent. 2 Am. Jur., p. 352, Sec. 445.

This is the complete testimony tending to establish that the truck driver was the servant of the defendants. Such evidence is not competent to show a master-servant relationship existed between the defendants and the truck driver.

Counsel for plaintiffs might urge that the truck driver was the servant of William Siebrand, and that William Siebrand was in a joint adventure with the defendants. We vigorously oppose any such theory and assert that there was no evidence of a joint adventure. This question will be more thoroughly discussed in connection with proposition of law No. 8.

Proposition of Law No. 3

The amount recovered as actual or compensatory damages against a servant is the limit of the amount to be recovered as damages against the master in those cases where the negligence of the master is derivative.

Specification of Errors Nos. IV and V will be discussed in connection with the argument on propositions of law Nos. 3 and 4.

Proposition of Law No. 3 is based on the law of negligence as it relates to master and servant. We do not, however, admit that the truck driver was the servant of the defendants, or was the servant of one engaged in a joint adventure with the defendants, but will, for the purpose of this argument, assume that the truck driver was the servant of the defendants.

The general rule that a judgment against the servant is limited to the amount recovered against the master where the only negligence of the master is

derivative is set forth in 35 Am.Jur.Supp., Sec. 591, at Page 72. This section reads in part as follows:

“The rule is established in most jurisdictions in which the question has arisen that the amount recovered as actual or compensatory damages in a tort action against a servant who was the active tort-feasor is the limit of the amount recoverable as damages against the master whose responsibility is solely derivative, and this rule applies in situations in which the judgment is recovered against the master in an action against him which is subsequent to the action in which the judgment was rendered against the servant, as well as in situations in which the judgment is rendered against the master in the same action as that in which the judgment is rendered against the servant.”

There is little dissent from the general rule above quoted. The decisions almost universally conform to this rule of law. In *Ferne v. Chatterton*, 363 Pa. 191, 69 Atl. 2d 104, an action was brought against the owner of the truck and the driver of the truck to recover damages arising out of a traffic accident. There were three plaintiffs in the case, the widow of the deceased, the estate of the deceased, and the daughter. A judgment was recovered against the driver in behalf of the estate for \$50.00; a judgment was rendered in favor of the daughter against the driver for \$50.00; the widow recovered nothing against the driver. Against the owner of the truck, the widow recovered \$1,500.00; the estate recovered a judgment for \$2500.00; the daughter recovered a judgment for \$5000.00. At Page 107 of the Atlantic citation, the court stated:

“It is obvious that such verdicts are legally indefensible, since the liability of Chatterton (owner) results solely from his status as employer, upon the

principle of respondeat superior; there being no question of punitive damage in the case, it is clear that he cannot be assessed a greater measure of damages than that imposed upon his employee, who was the active joint tort-feasor. Even in an action against joint tort-feasors, the verdict must be for a lump sum against all, and the damages cannot be apportioned among them, and where the defendants are in the relation of employer and employee, as in the present instance, the applicability of this principle is even more obvious."

In *Phinnix v. Griffin*, 221 N.C. 348, 20 SE 2d 366, the plaintiff sued both master and servant for a tort committed by the servant in the course of his employment. In the first trial, a non-suit was granted against the master, and a judgment was recovered against the servant in the amount of \$1000.00. On appeal, the non-suit against the master was reversed, and on the trial of the case the plaintiff recovered a judgment in the sum of \$5000.00. The court stated:

"The rule is general and well settled that where the liability, if any, of a principal or master to a third person is purely derivative and dependent entirely upon the principle of respondeat superior, the judgment on the merits in favor of the agent or servant, or even a judgment against him, insofar as it fixes the maximum limit of liability, is res judicata in favor of the principal or master, where he was not a party to the action."

Also, in 141 A.L.R., at Page 1168, there is an annotation relating to the amount of recovery in tort actions against a servant or other person who was the active tort-feasor as the limit of the amount recoverable against one whose responsibility was only derivative. At Page 1169, the general rule is stated to be almost

identical with the rule above quoted in 35 Am.Jur. Supp., Sec. 591, Page 72.

Sec. 96 of the Restatement of Judgments at Page 472 provides:

“(1) Where two persons are both responsible for a tortious act, but one of them, the indemnitee, if required to pay damages for the tort, would be entitled to indemnity from the other, the indemnitor, and the injured person brings an action against the indemnitor because of such act, a valid judgment

(a) for the defendant on the merits for reasons not personal to the defendant terminates the cause of action against the indemnitee;

(b) for the plaintiff binds him as to the amount of recovery in a subsequent action by him against the indemnitee, but does not bind the indemnitee in any respect.”

At Page 478 of Restatement of Judgments, under Sec. 96, the following example is set forth:

“3. A, who is B’s servant, injures C. In an action by C against A, judgment is given for C in the amount of \$1000.00. In a subsequent action by C against B on the ground that A was negligent in the scope of his employment, C’s possible recovery of damages is limited to \$1000.00.”

In 16 A.L.R. 2d, at Page 969, there is an annotation concerning the Court’s power to grant a new trial as to both defendants over their objection, where the jury renders one verdict holding the employer liable, and another verdict absolving the employee from any liability. This question is closely akin to the one in the present case where the verdict against the employer is

in a greater amount than the one against the employee. In each case it is a question of inconsistent verdicts, when such employer or servant is the active tort-feasor, and the only negligence of the master or employer is derivative from the acts of the servant.

Apparently, the only real question considered in the annotation in 16 A.L.R. 2d is whether or not the master or employer was completely released from any liability by the holding that the servant is not liable or whether a new trial should be granted. At Page 969, it is stated:

WFM “The propriety of granting a new trial as to both defendants, even over their protest, where the jury has returned an inconsistent verdict, holding the master liable ^{for} ~~for~~ exonerating the servant, whose negligence is the basis of the action, has been recognized in a number of cases.”

There is a compiler's note at the bottom of Page 969, which is significant. It states:

“No attempt has been made to collect the numerous cases wherein a new trial has been granted at the request and with the concurrence of one or both of the defendants, since, if the verdict is recorded as faulty at all, they should obviously be entitled to at least this relief.”

In *DeGraff v. Smith*, 62 Ariz, 261, 157, P. 2d 342, the defendant Munday was driving a truck for the defendant DeGraff, and while proceeding along the highway, Munday stopped the truck on the righthand side of the highway because of a broken axle. Before the defendant could place flares upon the highway indicating that the truck had stopped, the car in which the plaintiffs were traveling ran into and against the

unlighted truck, injuring the plaintiffs, and the plaintiffs brought action for damages against the defendant DeGraff, the owner of the truck, and against the defendant Munday, the driver of the truck. At the time of trial, the plaintiffs' attorney moved to dismiss the complaint against the defendant Munday. The complaint was dismissed and the trial proceeded against the defendant DeGraff. At the conclusion of the trial, the jury returned a verdict in the sum of \$2000.00 against the defendant and in favor of the plaintiff. Before entry of judgment on the verdict, the defendant DeGraff filed a motion for judgment notwithstanding the verdict, on the grounds that she could be held liable only on the theory of respondeat superior, and the dismissal with prejudice against Munday, her servant, operated as a bar to the verdict and is res judicata as to the negligence of the defendant DeGraff. The theory of the plaintiff was that DeGraff and Munday were joint tort-feasors, and they had the right to continue their action against DeGraff, after dismissing against Munday. At Page 343 of the Pacific Report, the court stated:

“Defendant DeGraff contends that joint tort-feasors are those who jointly, or by some concerted action, commit the wrong, and that active participation in the alleged negligence is necessary to constitute a person a joint tort-feasor. It is the defendant's contention that this is a case of master and servant and that the master's responsibility does not make him a joint tort-feasor, but that his liability is solely derivative. With this proposition we agree.”

At Page 343, the court quotes from *Interstate Motor Freight v. Henry*, 111 Ind. App. 179, 38 NE 2d 909, as follows:

“It is well established by a number of decisions in this state that where an action proceeds upon the theory that the relation of master and servant exists between the defendants, and that the master is liable solely because of the negligent acts of the servant, that a verdict in favor of the servant and holding the master guilty of negligence relieves not only the servant but the master from liability. (Citing cases.) These holdings are in accordance with the weight of authority in other states. Where a master and servant are joined as parties defendant in an action for injuries inflicted by the servant, a verdict which exonerates the servant from liability for injuries caused solely by the alleged negligence of the servant requires also the exoneration of the master. (Citing cases.)

“But a verdict in favor of one servant does not bar a recovery against the master, where the evidence shows that the negligence of another servant who is not joined as a party, or who if joined as a party is not exonerated by the verdict, has caused the injury. Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which, independently of the acts of the servant, liability may be predicated.” (Citing cases.)”

In answer to the last portion of the quote, the court stated:

“We can eliminate one feature of that case and that is wherein it says: ‘Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which independently of the acts of the servant, liability may be predicated.’ There is no evidence in the case that the defendant DeGraff was guilty of an act of negligence on which, independently of the acts of the servant, liability may be predicated.”

We deem this case particularly significant inasmuch as the factual situation is quite similar. It is interesting to note that even though the truck stopped on the road, or immediately off the road, because of a broken axle, the court did not deem the failure to inspect the axle an act of negligence on the part of the owner of the truck, but held that any negligence of the owner must result from the doctrine of master and servant through the negligence of the driver of the truck.

It is the contention of the defendants that the evidence unequivocally shows that if the defendants were negligent in any manner whatsoever, such negligence could only exist through the acts of their servants. Neither of the defendants were driving the truck or in any manner had any specific control over the truck at the time of the accident. As a matter of fact, they were many miles from the scene of the accident. There is no evidence showing that either of the defendants assisted in connecting the truck to the trailer. The record is absolutely void of any evidence which connects the defendants with any active participation which could be construed as negligent conduct in connection with this accident. The evidence does show that the truck was being driven at the time of the accident by truck driver Carroll (T.R. 204). Likewise, the evidence conclusively shows that truck driver Carroll hooked up and connected the trailer to the truck and at the time of so doing neither P. W. nor Hiko Siebrand was present (T.R. 205). Furthermore, the plaintiffs did not allege in their complaint nor introduce any evidence whatsoever at the time of the trial that there was any negligence on the part of the defendants other than the alleged negligence which occurred at the time of the

collison. In this regard, the third paragraph of plaintiffs' amended complaint, the only paragraph touching on this matter, reads as follows:

“On February 20, 1953, while plaintiffs were proceeding in their automobile in a northerly direction on the Tempe bridge just north of the business district of Tempe, Arizona, defendants so negligently, carelessly and wantonly maintained and operated their motor vehicle and a heavily loaded trailer attached thereto, as to cause said trailer to become disconnected, and run into the automobile of plaintiffs with great force and violence.” (T.R. 3 & 4)

In analyzing this allegation of the complaint, it is obvious that the only acts of negligence of the defendants referred to are those that occurred during the time plaintiffs were proceeding in a northerly direction on the Tempe bridge. At such time and place, the truck driver was operating and maintaining the vehicle of the defendants in a southerly direction on the Tempe bridge. The plaintiffs did not produce one iota of evidence at the trial that the defendants Siebrand were negligent in any other manner. Inasmuch as the truck driver Carroll was in complete control and charge of the vehicle at this time, and the defendants were not present and exercised no physical control over the vehicle, the unescapable conclusion must be that if the defendants were negligent in any manner whatsoever, such negligence was derived from the actions of the driver in operating and maintaining the truck at the time of the accident.

We respectfully urge that in this particular case the verdict against the defendants Siebrand cannot be any greater than the verdict against the truck driver.

Carroll, and inasmuch as the plaintiffs have not appealed from the verdict in the sum of \$100.00 against Carroll, the truck driver, as stated by the earlier cases cited, the judgment against the defendants Siebrand should be limited to \$100.00. Should the Court disagree with this reasoning, we submit that in any event, the verdicts are inconsistent, and the defendants are entitled to at least a new trial.

Proposition of Law No. 4

The amount of damages to be assessed against two joint tort-feasors cannot be apportioned, but must be in the same amount against all such joint tort-feasors.

We do not concede that the defendants Siebrand and the truck driver Carroll were joint tort-feasors. We respectfully represent that if the defendants Siebrand were negligent in any manner, it was derivative negligence, as set forth in the argument under proposition of law No. 3. Before the defendants Siebrand can be properly classified as joint tort-feasors, they must have actively participated in the commission of the injury. In 52 Am.Jur., Sec. 113, Page 454, it is stated:

“Indeed, it has even been declared that to render persons joint tort-feasors, they must actively participate in the act which causes the injury.”

See also *DeGraff v. Smith*, 62 Ariz. 261, 157 P. 2d 342, supra, which likewise states that to be joint tort-feasors, there must be active participation in the alleged negligence.

As heretofore stated, there was no active participation on the part of the defendants Siebrand. The only

possible theory upon which the defendants Siebrand could be designated joint tort-feasors is that they were negligent in failing to inspect the trailer-hitch on the truck and trailer. The plaintiffs did not allege such negligence in their complaint and introduced no evidence at the time of the trial in this connection. Furthermore, it was established by competent evidence at the trial that the trailer-hitch on the truck was in good working order after the accident and in no way contributed to the accident (T.R. 283). There was some evidence that the trailer-hitch connected to the trailer broke at the time of the accident (T.R. 241). There was no evidence that the inspection of the trailer-hitch on the trailer would have revealed any patent defect. As a matter of fact, the testimony was that both the truck and trailer were inspected in regard to the trailer-hitch before they were hooked up and were apparently in good condition insofar as an inspection would reveal (T.R. 239, 226 & 207). Furthermore, it should be remembered that the trailer belonged to William Siebrand (T.R. 248 & 250). And there was no obligation whatsoever upon the defendants Pete and Hiko Siebrand to inspect said trailer or any obligation on their part in connection with said trailer, unless William Siebrand, Pete Siebrand and Hiko Siebrand were engaged in a joint enterprise. We assert that they were not and this matter will be discussed later in the argument. In any event, the plaintiffs did not allege any negligence on the part of the defendants Siebrand in connection with inspecting the truck and trailer, and even if such negligence had been alleged, all of the evidence established that as far as one could tell by inspection, the truck and trailer hitches were in good mechanical condition. For these reasons, we assert that the truck driver Carroll and the defendants Siebrand were not joint tort-feasors.

Assuming, for the purpose of argument, however, that the truck driver Carroll and the defendants Siebrand were joint tort-feasors, the assessment of damages against each of them must be for one sum and cannot be severally apportioned. The judgment must be a joint judgment for one amount against all of those found liable.

The general rule that a judgment against joint tort-feasors must be one judgment and cannot be apportioned is set forth in Vol. 49 C.J.S., Sec. 36(a), at Page 85, at which page it is stated:

“In actions at common law for tort, while judgment may be entered against certain defendants and in favor of others, the judgment must be a joint judgment for one single amount against all found liable, and cannot exceed in amount that for which judgment could have been rendered under a verdict returned against a particular defendant.”

In the case of *Wear-U-Well Shoe Co. v. Armstrong*, 176 Ark. 592, 3 SW 2d 698, the plaintiff sued the corporation and the auditor of the corporation for malicious prosecution. A verdict was returned against the auditor in the sum of \$750.00, and a verdict was returned against the shoe corporation in the sum of \$1,750.00. In reversing the judgment of the lower court because of inconsistent verdicts, the court stated:

“The lower court should have rendered a judgment upon the finding or verdict of the jury in the said sum of only \$750, since the jury fixed the liability of each tort-feasor and that of the auditor, who actively committed the wrong, his company only being liable therefor as having consented thereto and authorized his acts, and since he was liable also for the whole damage resulting, there could be no

greater recovery against either or both of the joint tort-feasors than the lower sum (\$750) assessed by the jury against the auditor.”

In *Gonsalves v. Baptiste*, 122 Atl. 340, 45 R.I. 365, the plaintiff sued the sheriff, and the person who filed the suit, for wrongful replevin. Judgment was returned against the sheriff in the amount of \$25.00, and against the person filing the suit in the amount of \$750.00. In the course of its opinion, the court stated:

“The proceeding is against the defendants as joint tort-feasors. That being so, the only verdict which could be properly rendered by the jury would be a single verdict against both of them.

“We think the trial court should have granted the defendants motion for new trial on the ground that the verdict of the jury was contrary to the law as given to them and unsupported by the evidence.”

In *Brady v. City of Philadelphia*, 41 Atl. 2d 355, 156 Pa. S 607, the City and adjoining property owners were sued for damages resulting from a faulty sidewalk. A verdict was returned in the sum of \$813.00, \$100.00 of which was apportioned against the City and the balance against the property owners. The court stated that the verdict was improper in form, and granted a new trial for that reason.

In *Southwestern Gas & Electric Co. v. Godfrey*, 178 Ark. 103, 10 SW 2d 894, the jury returned a verdict against one joint tort-feasor in the sum of \$14,000.00, and against the other joint tort-feasor for \$1,000.00. The court held:

“There could be no greater recovery against either or both the joint tort-feasors than the smaller

amount assessed by the jury against one of them.”

In *Watt v. Combs*, 12 So. 2d 189, an Alabama case, the court held:

“In an action against joint tort-feasors, the assessment of damages must be for a lump sum against those found guilty and cannot be severally apportioned between them.”

In *Washington Light Company v. Lansten*, 172 U.S. 534, 43 Law Ed. 543, the Supreme Court of the United States considered this question and stated at Page 550 of the Law Ed. Report:

“The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against the company alone. All the defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability.”

In *Boyeraman v. Detroit Free Press*, 272 NW 876, 275 Mich. 480, the court stated:

“That the court erred in permitting such an apportionment of damages when plaintiff had elected to sue both defendants in one action is very obvious. Wrongdoers sued together and found guilty in an action for slander or libel, or any other form of tort, are liable for the whole injury to the plaintiff; and the question as to whether one is more

culpable than another is of no importance, for each is liable for all the damages, without regard to the degrees of guilt.”

In *Oldham v. Aetna Insurance Company*, 17 Cal. App. 2d 144, 61 P. 2d 503, the jury assessed damages against one of two joint tort-feasors, both of whom were sued in the same action, at \$282.00 special damages, and \$6000.00 compensatory damages, and rendered a verdict against the other defendant for \$282.00 special damages, and \$4000.00 compensatory damages, and upon said verdict the trial court rendered judgment against one of the defendants for the sum of \$6,282.00, and against the other defendant for the sum of \$4,282.00, the appellate court reversed the judgment, stating:

“In an action for damages for false arrest, where evidence supported the finding that defendants were joint tort-feasors, judgment awarding certain sums as special and compensatory damages, as against one defendant, and a different sum as special and compensatory damages against the other defendant, held: erroneous, since damages were not severable.”

In *Weddle v. Loges*, 125, P. 2d 914, 52 Cal. App. 2d 115, the California court stated:

“At the outset, it should be noted that the verdict was for compensatory damages and special damages only; no punitive damages were awarded. The law appears to be well settled that where the action is for compensatory damages suffered as a result of a wrong in which both defendants joined, the damages cannot be severed. *McCool v. Mahoney*, 54 Cal. 491.”

In *Merriott v. Williams*, 152 Cal. 705-711, 93 P. 875-878; 125 Am.St.Rep. 87, the Supreme Court of California declared:

“In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from an injury inflicted, irrespective of the degree of culpability.”

We submit that the foregoing cases clearly support the proposition of law that the damages to be assessed against two joint tort-feasors cannot be apportioned. In this case, the jury apportioned the damages in such obvious extremes, to-wit, \$95,000.00 against defendants and \$100.00 against the truck driver, that the defendants are at least entitled to a new trial.

Proposition of Law No. 5

The verdict of a jury for damages, which is so excessive, unreasonable and outrageous as to shock the conscience of the court, and is beyond all measure of fairness, is actuated by partiality, passion and prejudice.

This proposition of law is in support of specification of error No. 6.

The law with respect to excessive verdicts is so flexible as to permit each case to stand upon its own bottom. In the case of *Stallcup v. Rathbun*, 76 Ariz. 62, 258 P. 2d 821, the jury awarded a verdict of \$45,000.00, but after the plaintiffs remitted the verdict to \$30,000.00, the court permitted the verdict to stand.

This case was for damages wherein a 22-year-old man, who was earning \$350.00 per month prior to the accident, received injuries consisting of the dislocation of the right hip, fracture of the rim of the hip, and extensive lacerations, with a 25 per cent permanent impairment of the function of the leg, and a medical expense of \$5,380.80. Although the court permitted the remitted verdict of \$30,000.00 to stand, the court made a discussion of excessive damages, and therein stated that if the verdict was so excessive as to strike mankind at first blush as being beyond all measure, unreasonable and outrageous, then the jury manifestly had been actuated by passion and prejudice. There is a long line of cases which hold that verdicts as large as the one in the case at bar are excessive, wherein the injuries sustained are far less extensive.

In order to properly appraise the injuries of the plaintiffs Gossnell, we must review the facts. The plaintiff George Gossnell was at the time of the accident sixty-five years of age (T.R. 54). According to the mortality tables introduced at the trial, said George Gossnell had a probable life span of only about eleven years. According to the testimony adduced at the trial, the plaintiff George Gossnell suffered no loss of earnings, his employer having permitted his earnings to continue, (T.R. 69-70) and the record shows that the injuries of the plaintiff George Gossnell were healing at the time of the trial, (T.R. 190-195) and the said George Gossnell had no serious permanent injuries (T.R. 203).

The injuries of the plaintiff Estella Gossnell were slight and were soon healed. From a reasonable review of all the facts of the case, the verdict of the jury ap-

pears to be outrageous and unreasonable and was based upon passion and prejudice.

The fact that the jury rendered a verdict of \$95,000.00 against the defendants Siebrand, and another verdict of only \$100.00 against the truck driver Carroll, who was actually driving the truck at the time of the accident, demonstrates that the jury held passion and prejudice against the defendants Siebrand, for under no theory of law could the jury have properly found a variance in the responsibility of the defendants Siebrand and the truck driver Carroll other than through passion and prejudice against the defendants Siebrand. *Stand Oil Co. of Cal., et al. vs. Shields*, 58 Ariz. 239, 119 P. 2d 116; *Rose vs. Missouri Dist. Telegraph Co.*, 328 Mo. 1009; 43 SW 2d 562; 81 A.L.R. 400; *Kelly vs. Muscatine B&SR Co.*, 195 Iowa 17, 191 NW 525; *Wooton vs. Dixon* (1952) (Ky. Court of Appeals) 252. SW 2d 874.

Proposition of Law No. 6

The admission of incompetent and immaterial evidence that is prejudicial to one of the parties to a law suit constitutes reversible error.

Specification of error No. VII will be discussed in connection with the argument on this proposition of law.

This proposition of law is so fundamental and universally accepted that we will cite only one case to substantiate it. In *Montgomery Ward and Company v. Wright*, 70 Ariz. 319, 220 Pac. 2d 225, the Court held that the admission of remote and immaterial statements which were prejudicial to the defendant constitutes reversible error.

To permit the plaintiffs to introduce evidence with respect to the absence of safety chains connecting the truck and trailer was prejudicial against the defendants. The laws of the State of Arizona do not require the use of safety chains on trucks pulling trailers, and there being no law requiring such safety chains, there was an inference that the defendants were negligent in the operation of the truck and trailer referred to in this case by permitting the introduction of evidence showing that no safety chains were used on said equipment. When the plaintiffs offered such evidence, the defendants objected, and the Court permitted the introduction of said evidence over the defendants objection. The following is the record with reference to said matter: (T. R. 238).

“Q. Now, as far as chains on that truck, you didn’t have any safety—

MR. WILSON: I object as being immaterial.

MR. MAHONEY: Immaterial? It is very material.

THE COURT: He may answer.

BY MR. RAINERI:

Q. You didn’t have any safety chains on that truck at all, did you?

A. No, sir, I did not.

It was clearly immaterial as to whether or not safety chains were used on the truck and trailer and to permit the admisison of the testimony relating to the absence of safety chains was prejudicial to the defendants, contrary to the law applicable in such cases, and constituted reversible error.

Proposition of Law No. 7

A statement by a member of a partnership who is not acting for the firm on the occasion in question would not be admissible to bind the partnership or other partner as to the matters contained in the statement.

Specification of Errors Nos. VIII and IX will be discussed in connection with the argument on this proposition of law.

In the deposition of Fred Clark, which was introduced in evidence over the objection of the defendants, Mr. Clark testified that he had a conversation with the defendant, P. W. Siebrand, and that in the course of the conversation, Mr. Siebrand stated that he was very sorry about the accident and was going to stand all damages and buy the plaintiffs a new car (T.R. 111 & 112). At the time of taking the deposition, Mr. Breen, representing the defendants, objected to the statement on the ground that it was hearsay and that any statement or admissions made by P. W. Siebrand could in no way bind the defendant Hiko Siebrand or the truck driver Carroll (T.R. 111). These same objections were made by defendants at the time of trial (T.R. 104, 105). The statement allegedly made by the defendant P. W. Siebrand was not made in the presence of the other defendants. It was not made before the accident or at the time of the accident so as to be part of the *res gestae*. There was no testimony that the defendant P. W. Siebrand was acting for and on behalf of the partnership when such statement was made. Consequently, this statement falls squarely within the proposition of law above stated, and to admit such statement was highly prejudicial to the defendants, Hiko Siebrand, truck

driver Carroll, and Siebrand Brothers Circus and Carnival.

The plaintiff, Estella Gossnell, testified that a day or so after the accident, the defendant, P. W. Siebrand, and the truck driver, Carroll, came to see her and, in the course of the conversation, Mr. Siebrand introduced the truck driver as "the man who was driving the truck for him that day." (T.R. 81). The defendants objected to such statements (T.R. 81). Again, on this occasion, the defendant, Hiko Siebrand, was not present. The statement did not occur at the time of the accident, but at least one, and maybe several days, after the accident, and there was no evidence that the defendant Siebrand, in making such statement, was acting for and on behalf of the partnership. The defendant Siebrand flatly denied making any such statement (T.R. 305). Likewise, the truck driver denied such statement was made (T.R. 234 & 235); but, assuming such statement was made, or the jury believed such statement was made, it could not be binding upon the defendant, Hiko Siebrand, and was highly prejudicial to him.

In *Looney v. Bingham Dairy*, 75 Utah 53, 282 Pac. 1030, the Supreme Court of Utah considered a similar question. In this case, a statement was allegedly made by a member of a partnership while inquiring about the condition of a boy who had been kicked by a horse belonging to the firm. Such statement was to the effect that the horse was mean and a kicker. It was urged that such statement was inadmissible against the partnership and the other partner, in that such statements were not shown to have been made in the course of or pursuant to partnership business, and was not admissible against the partner not making the statement.

The Court agreed with this contention, and at page 1033 of the Pacific Reports, stated:

“We think the contention is well founded. The rule is that the admissions of one co-partner in respect to the joint business are competent against the firm and its members, but to render such admissions competent he must be acting as a partner about a partnership matter, or the admission must be made in relationship to matters within the scope of the partnership. 1 Ency. Evidence p. 579; 22 C. J. 403; 1 Elliott on Evidence 369; 2 Jones, Comms. on Evidence (2d, ed.) 1712. The rule is well illustrated and stated in the case of *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106. The evidence here shows that the admissions or statements made by Furgis, and as testified to by the parents of the boy, were not made under such circumstances. The making of any of such statements or admissions was denied by Furgis. The admission of such testimony as against Markakis and the firm was not only erroneous, but was prejudicial.”

A few of the other cases supporting the Proposition of Law above quoted are: *Scott v. Mundy*, 193 Iowa, 1360, 188 N.W. 972; *Caswell v. Maplewood Garage*, 84 N.H. 241, 149 Atlantic 746; *Mansfield v. Howell*, 218 Mo. App. 557, 279 S.W. 1058.

Defendants submit that the statements made by the defendant, P. W. Siebrand, out of the presence of Hiko Siebrand and after the time of the accident were not admissible against the defendant Hiko Siebrand, and to admit such statements without qualifying them in any respect was prejudicial error.

Proposition of Law No. 8

The relation of joint adventurers is created where two or more persons combine their money,

property or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly or in proportion to the capital contributed in the profits *and losses*, assuming that the circumstances do not establish a technical partnership.

Specification of Errors Nos. 3, 10, 11, 12, 13, 14, 15 and 16 will be discussed under this proposition of law.

While the law of joint adventurers is still a bit nebulous, the foregoing proposition of law states the generally accepted rule. This proposition of law was taken verbatim from 30 Am.Jur., Page 681, Sec. 7, and is more particularly discussed in 48 A.L.R. 1062 and 63 A.L.R. 914. It is important to note that it is necessary for the parties to share in the losses in order to establish a joint adventure. In 30 Am.Jur., Page 682, Sec. 12, the matter of sharing in losses is carefully discussed, and in this regard the following is stated:

“It has been declared that at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses.”

In the case at bar, one William Siebrand was running a bird concession in connection with the circus and carnival of the defendants. To put his concession in the show he paid rent on a footage or percentage basis (T.R. 254). The defendants did not share in the profits or losses of William Siebrand, and neither did William Siebrand share in any of the profits or losses of the defendants' circus and carnival (T.R. 288). William Siebrand was an independent business man operating his own business (T.R. 250, 257), and he could discontinue his concession at any time without the consent

of the defendants. There was no evidence in this case to show that William Siebrand exercised any voice or control in the operation of the business of the defendants.

Herewith is a case which is similar in facts to the case at bar :

In *Gottlieb Bros., Inc. v. Culbertson's*, 152 Washington, 205, 277 Pac. 447, Culbertson's conducted a large department store in Spokane, Washington. One Filas operated a fur department in the store, having a space of about fifty square feet upon the second floor of the department store. There was nothing to indicate that it was not a part of the business of Culbertson's. The janitor, telephone and cash carrying service were all furnished by Culbertson's. When the goods were sold, purchasers were given Culbertson's memoranda. If the sale was for cash, the money was turned into the accounting department of Culbertson's. If on credit, it was entered on the books of Culbertson's and they had charge of the collection. The agreement between Culbertson and Filas was that Filas was to pay Culbertson 15% of the gross sales of the furs and any other merchandise sold by Filas. Filas ordered certain merchandise from the plaintiff Gottlieb Bros. One order for merchandise was on Culbertson's stationery and the shipment of the goods was made to Culbertson and the goods received by Culbertson. Filas went bankrupt and the plaintiff, Gottlieb attempted to recover from Culbertson, contending that Culbertson and Filas were joint adventurers. At page 449 of the Pac. Reporter, in discussing this matter, the Court stated :

“(1) Appellant bases its principal contentions upon the claim referred to above in the bankruptcy

proceeding that Filas and the respondent were joint adventurers in the fur business conducted in the department store of respondent. The trial court found that there were no facts sustaining a joint adventure, or any kind of partnership, and that the facts showed only that Filas rented space in the store of respondent for the sale of furs for which light, heat, and janitor service were furnished by respondent, and as rent respondent charged 15 per cent of the gross sales of the furs and other merchandise made by Filas. The above facts were undisputed. These facts create no more than the relation of landlord and tenant between respondent and Filas.

(2) To constitute a joint adventure, there must be more than the mere fact of a share in the profits of the business. There must be other facts tending to show that relation *inter se*, as the intent of the parties; or such facts as to estop denial of it as against third parties. *Griffiths v. Von Herbert*, 99 Wash. 235, 169 P. 587. See also *Belch v. Big Store Co.*, 46 Wash. 1, 89 P. 174; *Miles Co. v. Gordon*, 8 Wash. 442, 36 P. 265.

“(3) One of the most important tests of a partnership or joint adventure is whether there is a share in losses. *Miles Co. v. Gordon*, *supra*; *State ex rel Ratliffe v. Superior Court*, 108 Wash. 443, 184 P. 348.

“(4) It is manifest that there was nothing in the relationship shown between Filas and respondent which would constitute them joint adventurers under our cases. Neither were there any such facts shown as would estop them to deny a joint adventure as against third parties. That such tenancies, even upon conventional term leases, are not unknown, based upon rentals consisting of a percentage of the gross income. See *Cissna Loan Co. v. Baron* (Wash.) 270 P. 1022.”

In *Estrella v. Suarez*, 60 Ariz. 187, 134 P. 2d 167, the court held:

“Under all the authorities, sharing in the profits is necessary to create a joint adventure which is merely a partnership for a single transaction.”

The only possible evidence which might tend to show that the defendants and William Siebrand were in a joint adventure is: first, the sign painted on the side of the trailer owned by William Siebrand, which read: “Siebrand Brothers Carnival and Circus.” (T.R. 256); second, policeman John D. Boyd’s statement that the trailer contained rides, concessions and stuff for a carnival (T.R. 142); and third, Peter H. Siebrand, a son of the defendant P. W. Siebrand, testified that he assisted in getting the trailer from Tempe to Mesa after the accident (T.R. 285). This testimony falls far short of establishing joint adventure between the defendants and William Siebrand.

It is not uncommon for advertisers to paint signs on the side of trailers, even though they have no direct interest in the trailer. Ralph Horstman testified that the Pepsi Cola Co. had the following ad on the side of his concession: “For a light refreshment, drink Pepsi Cola.” He further testified that the Pepsi Cola Co. owned no interest in his concession (T.R. 278). Certainly no one would dispute this proposition. Likewise, William Siebrand testified that the defendants owned no interest in his concession (T.R. 250). There was no tie-in shown in any respect concerning the policeman looking in the trailer and testifying that it contained rides, concessions and stuff for a carnival, and also no tie-in was shown in Peter H. Siebrand’s assisting in getting the trailer from Tempe to Mesa. Taking this

testimony in its most favorable light, at most, it would only produce an inference that there was some connection between the defendants and William R. Siebrand, and this inference was conclusively overcome by the many positive statements of both the defendants and William Siebrand that the defendants did not own or have any interest in the trailer (T.R. 250, 271 & 288).

Assuming, but without admitting that it is not necessary that the parties share the losses in a joint adventure, almost without exception the cases approve the following definition of a joint adventure:

“A joint adventure is an association of persons to carry out a single business enterprise for profit for which they combine their property, money, efforts, skill and knowledge, and each participant therein is an agent for each of the others, and it is essential that each have control of the means employed to carry out the common purpose.” *Torietto v. G. H. Hammond Co.*, 110 Fed. 2d 135; *Soulek v. Omaha*, 140 Neb. 151, 299 NW 368.”

It is the contention of the defendants that there was not sufficient evidence of joint adventure for the court to give instructions concerning joint adventure, but assuming there was such evidence, then the court should have given the proper definition of joint adventure. This it did not do. In defendants' requested instructions Nos. 2 and 3, a correct definition of joint adventure was set forth, but the court refused to give these instructions (T.R. 35, 36 & 37). In defendants' requested instruction No. 4, they requested that an instruction be given to the effect that if the agreement between William R. Siebrand and the defendants was an agreement for the rental of space, such agreement did not constitute a joint adventure. We submit that

this was a proper statement of law, and under the case of *Gottlieb Bros., Inc. v. Culbertson*, *supra*, such instruction should have been given. In giving the plaintiffs' instruction No. 2 (T.R. 22), the court failed to give a proper definition of joint adventure. The pertinent part of this instruction is as follows:

“If you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand and William Siebrand intended and did join their efforts in furtherance of the circus and carnival show to be shown at the Maricopa County Fair at Mesa for their joint profit, then you may find that they were joint adventurers.”

This instruction fails to give all of the elements of joint adventure, as heretofore set out. It mentions nothing of sharing losses; it mentions nothing of each having control over the joint adventure; it mentions nothing about each participating therein. The only element that it does have is—“if the parties join together for their joint profit.” We submit that the facts do not substantiate the element that the defendants and William Siebrand had an agreement wherein each was to share in the profits. Under their agreement, the defendants were to get a definite percentage of the gross profits, and in many instances William Siebrand might fail to make a net profit, or even might have losses, and the defendants would still get the amount due them for rent from the gross profits.

Plaintiffs' requested instruction No. 3 (T.R. 23) is concerned with the liability of joint adventurers. We urge that it was error for the court to give this instruction without having properly defined joint adventure, and where there was no competent evidence of joint adventure.

The pertinent part of defendants' requested instruction No. 5 is as follows: (T.R. 24).

"If you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise which P. W. Siebrand, Hiko Siebrand and William Siebrand were interested in, then in such event, you are instructed that P. W. Siebrand, Hiko Siebrand and William Siebrand were joint adventurers."

Again, we respectfully urge that this falls far short of giving a correct definition of a joint adventure. The only requirement for joint adventure under this instruction is that the parties have an interest in a certain business enterprise. Many persons may have had some interest in the trailer being taken from Phoenix to Mesa, but certainly that alone wasn't sufficient grounds to constitute all persons so interested as joint adventurers.

Plaintiffs' instruction No. 8 provides in part as follows: (T.R. 26).

"You are instructed that a duty rests upon every man in the management of his own affairs, whether by himself or his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured, he shall answer for the damage."

The second part of this instruction then goes on to state that imputed negligence stems from the joint enterprise. This instruction fails to properly state the law in that if the law were as above stated, every person would be an insurer of all acts of his agent. Nowhere does it state that such liability depends upon the negli-

gence being the proximate cause of the injury, but it is flatly stated that if injury occurs by one's servant, the master is liable. Obviously, this is not the law.

Again we assert that at no time did the plaintiffs in their instructions include a correct definition of joint enterprise, and the Court committed error in giving the instructions relating to joint adventure without first stating a proper definition. Furthermore the Court committed prejudicial error in giving instructions on joint adventure which did not correctly state the law on the subject.

Proposition of Law No. 9

The payment of the money due under a judgment is a compliance of the mandate of the judgment and is considered the satisfaction of a judgment, and the court is without jurisdiction to prevent the satisfaction of a judgment when the judgment debtor complies with the judgment of the court.

This proposition of law supports specification of error No. XVII.

The general rule of law is that when a judgment debtor complies with a judgment of the court, then the judgment has been satisfied. The jurisdiction of the court continues until the satisfaction of the judgment, and then it ceases.

In the case of *Gulf, Colorado, and Santa Fe Railway Company v. E. B. Muse*, District Judge, 109 Tex. Reports 352, 207 S.W. 897, 4 A.L.R. 613, we find a state of facts wherein the judge had extended a term of court for the purpose of completing a trial and entering

the orders and the judgment in the case. After the final judgment was entered, the plaintiff applied for a writ of mandamus which would have compelled the court to take further jurisdiction in the cause. The Supreme Court of Texas ruled that once a judgment has been entered that the jurisdiction of the court ceases. Quoting from this case, as reported on page 900 of Southwest Reports, we find the following:

“It is the very essence of defendant’s right that he is entitled not to have to respond further to plaintiff’s cause of action than by payment of his judgment.”

Obviously, in the case at bar, the defendant, truck driver Carroll, would not have to respond further than the payment of the judgment entered against him; and the court was without jurisdiction to prevent satisfaction of the judgment. In the case of *Wright v. Swayne*, 104 Tex. 444, 140 S.W. 222, the Supreme Court of Texas said the following:

“If the court shall wilfully refuse to execute its own judgment according to their true intent and affect, we would have the authority and it would be our duty to direct it to proceed to execute the judgment and sentence of the law.”

According to this statement of the law, it is within the province of the United States Court of Appeals in the present case to direct the United States District Court of Arizona to accept satisfaction of the judgment against the truck driver Carroll.

When the truck driver Carroll paid the amount of the judgment against him into court, the Court was without jurisdiction to refuse satisfaction. It would

appear that the Court then realized that the satisfaction of the judgment against the truck driver Carroll would be a complete discharge and satisfaction of the judgment against the defendants Siebrand, and therefore, in an attempt to save the judgment against the defendants Siebrand, stepped outside of its jurisdiction and attempted to prevent the satisfaction of the judgment against the truck driver Carroll. Obviously, the Court had no jurisdiction to do this.

It is self-evident from the foregoing that once the judgment against the defendant, truck driver Carroll, had been satisfied, the judgment against all of the judgment debtors, including the defendant Siebrands, would have likewise been satisfied, for the satisfaction of a judgment against one judgment-creditor is a satisfaction against all judgment-creditors who are liable in the same cause of action.

In the Restatement of the Law of Judgments, Sec. 95, P. 469 we find the following:

“The discharge or satisfaction of a judgment against one of several persons each of whom is liable for a tort, breach of contract, or other breach of duty, discharges each of the others from liability therefor.”

From the foregoing, it is apparent that the payment of the judgment by the truck driver Carroll satisfied such judgment against the defendants. The Supreme Court of Arizona has repeatedly said that, except where otherwise stated by the Court, the Court would follow the Restatement of the Law. *Normort v. Smith*, 51 Ariz. 134, 75 P. 2nd 38.

Conclusion

For the reasons heretofore stated, we respectfully urge that this Court should declare that the judgment against the truck driver Carroll has been satisfied and thus the judgment against the defendants Siebrand has been satisfied. Should the Court disagree on this point, we then urge the Court that a new trial should be granted limiting the amount of damages to be assessed against the defendants to the sum of One Hundred Dollars (\$100.00), the amount heretofore recovered against the truck driver Carroll. In the event the Court disagrees with the first two propositions, we submit that at least the defendants are entitled to have the Ninety Five Thousand Dollar (\$95,000.00) judgment reversed and a new trial awarded. Should the Court likewise disagree with this contention, then we respectfully urge that the verdict against the defendants Siebrand is excessive and was granted under passion and prejudice and should be limited to a reasonable amount.

Respectfully submitted,

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KENT A. BLAKE and
RICHARD F. HARLESS,

By

Attorneys for Appellants,

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IN THE
**United States
Court of Appeals**

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND
BROTHERS CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

FILED

FEB - 4 1955

PAUL P. O'BRIEN,
CLERK

**Brief of Appellant Upon Appeal from
The United States District Court
for the District of Arizona**

HOWARD W. GIBBONS,
First National Bank Building,
Phoenix, Arizona

Attorney for Appellant,
S. J. Carroll

Filed this.....day of February, 1955

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IN THE
**United States
Court of Appeals**

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND
BROTHERS CIRCUS AND CARNIVAL,

Appellants,

vs.

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NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

No. 14468

**Brief of the Appellant Upon Appeal from
The United States District Court
for the District of Arizona**

*(Figures in Brackets refer to
page of the Transcript of Record)*

**Statement of Pleadings
and Facts Disclosing Jurisdiction**

On the 10th day of September, 1953, the appellees George F. Gossnell and Estella Gossnell, his wife, filed a civil action in the United States District Court for the District of Arizona, Phoenix Division, wherein they alleged the following jurisdictional facts: that the appellees are residents of the State of Iowa (T.R. 3); that

the appellants, P. W. Siebrand, Hiko Siebrand, and S. J. Carroll, are residents and citizens of the State of Arizona (T.R. 3). The appellees seek to recover damages from the appellants in the amount of \$111,215.00 (T.R. 5) for alleged injuries sustained from an accident which occurred on the bridge of Highway 60 and 70, near Tempe, Arizona, on February 20, 1953.

The pleadings, as above set forth, clearly allege jurisdictional facts sufficient to permit this suit to be filed in the District Court of Arizona, as authorized under the provisions of Title 28, Section 1332, U.S.C.A., which provides in part that the District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3000.00, exclusive of interest and costs, and is between citizens of different states. This appeal is properly filed in the United States Court of Appeals for the Ninth Circuit, pursuant to the provisions of Title 28, Section 1291, U.S.C.A., wherein it is provided in part that the court of appeals shall have jurisdiction of appeals from all final decisions of the United States District Courts of the United States. This appeal is from a final decision of a district court of the United States. Title 28, Section 1294, U.S.C.A., provides that the Ninth Circuit Court of Appeals is the proper circuit of the Court of Appeals to consider this matter.

Statement of the Case

For the sake of clearness in this brief, the appellant S. J. Carroll will be known as the "the truck driver." The appellants P. W. Siebrand and Hiko Siebrand will be known as "the defendants," and the appellees, George F. Gossnell and Estella Gossnell, will be known as "the plaintiffs."

The facts are as follows: The plaintiffs, who are man and wife, were, on or about the 20th day of February, 1953, at about 10:30 in the morning, travelling Northwest on Highway 60 and 70 through the little town of Tempe, Arizona, and at this particular time they were proceeding on a bridge which crossed the Salt River near Tempe, (T.R. 75). At the same time, the truck driver was proceeding with a truck and trailer in a Southeasterly direction on the same bridge. The truck driver was driving a truck which belonged to the defendants, (T.R. 204), which was pulling a trailer belonging to William Siebrand, (T.R. 240 and 250) the nephew of the defendants. As said parties approached each other, the trailer became disconnected from the truck and crossed the highway, went head on into the plaintiff's car and caused damage to the car and bodily injury to the plaintiffs. At the conclusion of the case, the jury found for the plaintiffs and assessed damages against the defendants in the amount of \$95,000.00. The jury assessed damages against the truck driver, S. J. Carroll, in the amount of \$100.00. The truck driver, Carroll, offered to settle the judgment against him, but the plaintiffs refused to satisfy said judgment. Thereafter, the truck driver tendered into Court the sum of \$100.00, the amount of the judgment against him, and moved the Court for satisfaction of said judgment. The District Court denied the motion for satisfaction of judgment, and from that order denying the satisfaction of judgment this appeal was taken.

Specification of Error

I

The Court erred in denying the motion of the truck driver Carroll for satisfaction of judgment, after Car-

roll had paid the full amount of the judgment against him into the Court, for the reason that the Court was without authority to deny the satisfaction of such judgment after such amount was tendered into Court.

Summary of Argument

It is the contention of the truck driver that the judgment against him, in the sum of \$100.00, has been satisfied by the tender of such amount to the plaintiffs and upon their refusal to accept said amount upon tender to the Court; as a result thereof the truck driver is entitled to a complete release from any liability under the judgment, and the Court was without jurisdiction to deny truck driver's motion for satisfaction of judgment.

Argument

Proposition of Law No. 1

The payment of the money due under a judgment is a compliance of the mandate of the judgment and is considered the satisfaction of a judgment, and the court is without jurisdiction to prevent the satisfaction of a judgment when the judgment debtor complies with the judgment of the court.

Specification of Error No. I will be discussed in connection with this argument on the first proposition of law.

The general rule of law is that when a judgment debtor complies with a judgment of the court, then the judgment has been satisfied. The jurisdiction of the court continues until the satisfaction of the judgment, and then it ceases.

In the case of *Gulf, Colorado, and Santa Fe Railway Company v. E. B. Muse*, District Judge, 109 Tex. Reports 352, 207 S.W. 897, 4 A.L.R. 613, we find a state of facts wherein the judge had extended a term of court for the purpose of completing a trial and entering the orders and the judgment in the case. After the final judgment was entered, the plaintiff applied for a writ of mandamus which would have compelled the court to take further jurisdiction in the cause. The Supreme Court of Texas ruled that once a judgment has been entered that the jurisdiction of the court ceases. Quoting from this case, as reported on page 900 of the Southwest Reports, we find the following:

“It is the very essence of defendant’s right that he is entitled not have to respond further to plaintiff’s cause of action than by payment of his judgment.”

Obviously, in the case at bar, the defendant, truck driver Carroll, would not have to respond further than the payment of the judgment entered against him; and the court was without jurisdiction to prevent satisfaction of the judgment. In the case of *Wright v. Swayne*, 104 Tex. 444, 140 S.W. 22, the Supreme Court of Texas said the following:

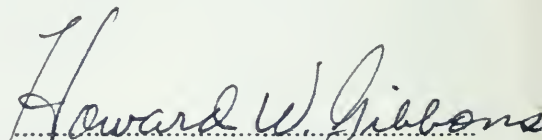
“If the court shall wilfully refuse to execute its judgments according to their true intent and affect, we would have the authority and it would be our duty to direct it to proceed to execute the judgment and sentence of the law.”

According to this statement of the law, it is within the province of the United States Court of Appeals in the present case to direct the United States District Court of Arizona to accept satisfaction of the judgment against the truck driver Carroll.

When the truck driver Carroll paid the amount of the judgment against him into court, the Court was without jurisdiction to refuse satisfaction. It would appear that the Court then realized that the satisfaction of the judgment against the truck driver Carroll would be a complete discharge and satisfaction of the judgment against the defendants Siebrand, and, therefore, in an attempt to save the judgment against the defendants Siebrand, stepped outside of its jurisdiction and attempted to prevent the satisfaction of the judgment against the truck driver Carroll. Obviously the Court had no jurisdiction to do this.

For the reasons heretofore given, we submit that the lower court exceeded its jurisdiction in denying the truck driver Carroll's motion for satisfaction of judgment, and respectfully urge that this court enter an order directing the lower court to satisfy the judgment of the defendant.

Respectfully submitted,


HOWARD W. GIBBONS,
First National Bank Building,
Phoenix, Arizona

Attorney for Appellant,
S. J. Carroll

No. 14468

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND, Doing
Business as Siebrand Brothers Circus and
Carnival,

Appellants,

vs

GEORGE F. GOSSNELL and Estella Gossnell,
His Wife, Appellees,

and

S. J. CARROLL,

Appellant,

vs

GEORGE F. GOSSNELL and Estella Gossnell,
His Wife,

Appellees.

No. 14468

BRIEF OF APPELLEES

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No. 14468

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND, Doing
Business as Siebrand Brothers Circus and
Carnival,

Appellants,

vs

GEORGE F. GOSSNELL and Estella Gossnell,
His Wife, Appellees,

and

S. J. CARROLL,

Appellant,

vs

GEORGE F. GOSSNELL and Estella Gossnell,
His Wife,

Appellees.

No. 14468

BRIEF OF APPELLEES

Appeal from the United States District Court
for the District of Arizona

STATEMENT OF THE CASE

Appellees deem it necessary to aid the Court in determining the questions presented on appeal to supplement the Statement of the Case contained in Appellants' Opening Brief, in the following respects:

The appellees, for the sake of clearness, accept appellants designation of the parties, to-wit: P. W. Siebrand and Hiko Siebrand the appellants being referred to as "the defendants," and the appellees George F. Gosnell and Estella Gossnell being referred to as "the plaintiffs." The appellant S. J. Carroll is referred to as "the truck driver."

John Boyd, a police officer, was immediately to the rear of the truck and trailer being operated by the truck driver as it was traversing the "Tempe Bridge" and with nothing to obstruct his view saw the trailer suddenly become disengaged from the truck towing it, and observed it suddenly veer left into plaintiffs' car. (T.R. 122, 123, and 124). The police officer asked the truck driver by whom he was employed and he said Siebrand Bros. Circus and Carnival. (T.R. 126, 127, and 138). He (the police officer) then examined the trailer hitch and found there was no safety chain or lock for the ball trailer hitch. (T.R. 127). The officer observed the hitch was not broken and that there had never been any lock on it at all. (T.R. 127, 132). The truck driver did not explain or offer to explain to the officer why he did not have a lock on the trailer hitch. (T.R. 142). The police officer told the truck driver he did not have proper equipment for pulling a trailer on the highway and the truck driver did not show him that anything was broken off. (T.R. 143, 144). The truck driver was then cited by the police officer for having unsafe equipment. (T.R. 127, 132, and 139). A bond was posted and forfeited. (T.R. 141). The law required a safety chain, officer Boyd stated. (T.R. 131). When being questioned by Mr. Wilson, one of defendants' attorneys, the officer testified:

"Q. What was there to hold it, then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

- A. There was supposed to be a chain and lock on it, but there was nothing on it." (T.R. 133).

The purpose of safety chains is to take care of a situation where, in case the hitch breaks in any way, it would prevent the trailer from veering to either side. (T.R. 142). Under questioning the truck driver admitted he had no safety chains on the truck. (T.R. 238).

The plaintiff George Gossnell was critically injured in that he sustained: a shattered knee, a compound comminuted fracture of the femur, broken ribs, and a skull fracture. He was left with impaired memory as a result of the skull fracture. (T.R. 61, 62, 67, and 68). He was also left with a very stiff knee. (T.R. 67). He was in a critical condition. (T.R. 146). The femur was broken in 10 different places, and he also suffered a fracture of the fibula (T.R. 148). He was in pain practically all of the time he was in the hospital at Tempe, and also had an embolism and other complications which would knock him out for eight or ten days at a time. (T.R. 62). He was in pain and uncomfortable practically all of the time up to the date of the trial which was held some 14 months after he sustained the injury. (T.R. 12, 57, and 63).

The defendants set forth on page 3 of their opening brief that the plaintiff George Gossnell was in bed in the court room throughout the trial, notwithstanding the fact that the fracture of his leg was healed. X-rays were taken on March 1, 1954, a little over a month prior to the trial (T.R. 12, 166) and revealed that he was bedridden because not enough callous had formed for the femur to bear weight. There was not sufficient solid union or healing so as to permit removal of the cast and to permit him to get up and around and return to activity. (T.R. 159, 152, 153, 167, 169, 178, 166, 169, and 171). He could not have been placed in a wheel chair with the cast on. (T.R. 176) because he was not ready for it. There was not enough healing to remove the cast. (T.R. 178). He would be laid up in bed for another year to a year and a half. (T.R. 173). Dr. Bishop called by the de-

defendant's testified that one would assume that the fracture was healed but "You can't be certain that it is". (T.R. 189).

The plaintiff George Gossnell has permanent residual effects as a result of said injuries. (T.R. 155, 171, and 172). He was bedridden from the time of the accident up to the time of the trial, except for a short interval when he was up about ten minutes at a time, and he later again became bedridden, (T.R. 57, 58, 59, 65, 66, and 67) four steel pins having been driven thru the leg attached to a steel plate for the purpose of supporting it.

The plaintiff George Gossnell had been employed by the Messenger Printing Co. of Fort Dodge, Iowa for 33 or 34 years with average annual earnings of \$7,000 a year. (T.R. 60)

The plaintiff Estella Gossnell had a couple of broken ribs, injured her arm, was bruised and black and blue about her body, and received a cut under the chin. She also experienced pain in her chest, and had an Ace bandage wrapped around her for treatment of her chest and back. (T.R. 77, 100, and 101). She worked in a drapery store and was earning \$150.00 per month and had not worked up to the date of the trial. (T.R. 77).

As set forth by defendants in their opening statement, they claim the truck driver drove their truck without their knowledge and consent. (T.R. 291, 292, 270 and 271).

After the accident Peter H. Siebrand, a son of one of the defendants, P. W. Siebrand, came upon the accident (T.R. 281). He helped the truck driver at the scene. (T.R. 282). He had the trailer moved to a parking lot and called up his father, one of the defendants, and told him what he had done about the trailer. (T.R. 307). P. W. Siebrand, one of the defendants, went to see the Gossnells twice at the hospital, and talked to a Mr. Clark who was a friend of the Gossnells at Mesa. Mr. Clark had gone to see P. W. Siebrand at the latter's request. (T.R. 81, and 308). The second time Defendant P. W. Siebrand went to

see the Gossnells he took his attorney and his secretary with him. (T.R. 308). He made a report to the State of the accident under the Financial Responsibility Act and did not have William Siebrand (who was a nephew and owner of the trailer) sign it. (T.R. 309). William Siebrand (the nephew of defendants) testified he told the truck driver to take his truck and pull his trailer. (T.R. 255). The truck driver testified he was not an employee of the defendants but was driving for William Siebrand, the nephew, and had obtained the wrong truck. (T.R. 203, 204, and 205). The nephew, William Siebrand, made no attempt to get in touch with Mr. and Mrs. Gossnell and never went near them. (T.R. 262). The truck driver told Police Officer Boyd at the scene of the accident that he was employed by Siebrand Bros. Circus and Carnival. (T.R. 126, 127, and 138). The defendant P. W. Siebrand introduced the truck driver at the hospital to Mrs. Gossnell "as the man who was driving the truck for us that day." (T.R. 81, 91, 92, and 93). P. W. Siebrand, one of the defendants, asked Mrs. Gossnell if they needed money when he visited her at the hospital, and asked her if she could drive. He said he would buy them a new car so that she could take her husband home and that he would pay all damages. (T.R. 95, 96, 97, 98, and 99). P. W. Siebrand stated to Mr. Clark, a friend of the Gossnells, at Mesa that lawyers should not be brought into the case as they could settle between themselves; that he would stand all damages; that lawyers would drag the case through the courts for several years. (T.R. 113).

The foregoing represent some of the salient facts adduced at the trial. Further pertinent facts will be developed during the course of the argument.

SUMMARY OF ARGUMENT

The plaintiffs submit that the doctrine of *res ipsa loquitur* was applicable to the facts involved in the case at bar, and that

the trial judge was warranted in instructing the jury with respect thereto.

It is further submitted that in view of the direct, forceful, and positive evidence given by Officer Boyd there is extreme doubt as to whether the plaintiffs need seek help and support of the doctrine of *res ipsa loquitur*.

Under the provisions of Arizona law it is not necessary in order to establish a master-servant relationship to show that there was a contract giving the master control of details of the work of the servant; nor to show power to hire and dismiss; nor to show provision for compensation of the servant.

The liability of the master is derivative only in those instances where he is not guilty of negligent conduct, and his liability is based solely upon the negligent conduct of the servant.

Plaintiffs urge that two separate and distinct verdicts in unequal amounts may be returned against two tortfeasers who were both active participants in two separate and distinct wrongful acts. Under such a fact situation their liability becomes a several one.

The verdict of the jury for damages was not excessive, nor was the jury actuated by partiality, passion or prejudice. The mere reference to a verdict as being excessive does not make it so unless it is clear that the verdict finds no support in the evidence; and a Federal Appellate Court is not wont to disturb the affirmance of a verdict by the trial judge.

The evidence introduced by plaintiffs relative to safety chains was not incompetent, immaterial or prejudicial, and the admission of such evidence was not error, especially in view of the conduct of opposing counsel in introducing similar evidence on cross-examination.

The statement of one partner, though made outside of the presence of the other partner, will become competent and admissible where no objection was properly made to the introduction of same, and where similar evidence was introduced by the partners through counsel.

The relation of joint adventurers is created when two or more persons combine their money, property or time in the conduct of some particular line of trade, or for some particular business deal and share in the profits. It is not essential to the creation of same that they share in the losses as well.

The trial court not only instructed the jury on the issue of joint adventure but also instructed the jury to the effect that the proof of ownership of the vehicle causing damage constitutes prima facie evidence that the driver thereof was an agent or servant of the owner. It is to be noted that the evidence quite properly supported both theories; and it was entirely correct and proper for the trial court to instruct the jury on every issue supported by the evidence.

Denial of appellant Carroll's motion for satisfaction of the judgment returned by the jury against him upon his deposit of the amount of the judgment with the court was discretionary with the trial court, and the order denying the motion was not an appealable one.

ARGUMENT

For the sake of clarity and comparison, appellees will answer appellants' arguments and propositions of law in the same order in which appellants set them forth in their briefs.

PROPOSITION OF LAW NO. I THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE.

Defendants, in their brief, advance the proposition that the doctrine of res ipsa loquitur has no application where the cause of

the accident is unexplained and might have been due to one of several causes for some of which defendants are not responsible. We wholeheartedly agree that this is a correct statement of the law, but the difficulty here is that it finds no support from the facts in this case. In the case at bar plaintiffs' automobile was in its own lane of traffic (T.R. 123, 124 and 243) and the trailer, after becoming disconnected from defendants' truck, crossed over into plaintiffs' lane of traffic and the collision occurred. Plaintiffs' car was where it had a right to be and the disconnected trailer was obviously in a place where it did not belong, and wrongfully invaded the path of plaintiffs' automobile. The truck and trailer were wholly under the control of the defendants and the truck driver. One need not speculate to arrive at the conclusion that the trailer drawn by the truck of the defendants was the direct cause of the accident. There was no other cause and could be no other cause.

In the case of *U. S. v. Johnson*, 181 F 2d 877, this Court, speaking through Circuit Judge Pope, adequately covers the doctrine of *res ipsa loquitur* and cites as authority Wigmore on Evidence. We deem the facts therein set forth particularly applicable to the fact situation in the case at hand. The Court there stated:

"A vehicle does not ordinarily capsize in this manner unless there has been negligence in inspection, maintenance or operation. No voluntary action on Johnson's part contributed to the injuries."

Likewise here, no action on the part of the plaintiffs Gossnell contributed to their injuries and damages. The evidence clearly does not support the view that any person or persons other than the defendants or the truck driver whom the plaintiffs contend was their agent were responsible for the accident or were in anywise a contributing cause. We invite the Court's attention to the case of *Weddle v. Loges*, 52 Calif. App. 2d. 115, 125 P. 2d. 914. In that case the defendant Loges, the employer,

and his agent Starr were engaged in towing a truck at the time plaintiff sustained injuries. A contention similar to that being made by the present defendants was apparently advanced in that case and the court there said:

"The evidence shows that the towrope broke, of which the exact cause was a matter the defendants were in a better position to explain than plaintiff—the operation of the two cars being under the exclusive direction of Loges and his agent or employee Starr, and the accident being one which would not in the ordinary course of things occur if those having the management and control of the instrument use proper care, and with the plaintiff unable to explain the cause of the swerve of the car into the tree, or the reason for the breaking of the rope, the doctrine of *res ipsa loquitur* was applicable.

It has been held that the doctrine of *res ipsa loquitur* may not be invoked where there is a divided responsibility and the negligence is in part that of a third party over whom defendant has no control. *Speidel v. Lacer* 2 Cal. App. 2d. 528, 38 P. 2d. 477. In the *Speidel* case the divided responsibility was of the defendant, an independent contractor, and plaintiff's employer; the control of the mechanical device not resting with defendant. In the present case the evidence tends to show the relationship of principal and agent between Loges and Starr."

Likewise, in the case of *U. S. v. Hull*, 195 Fed. 2d. 64, the court stated:

"The use of the Latin phrase '*res ipsa loquitur*' in this connection may be unfortunate, as suggesting that some exotic doctrine is involved. It is nothing more than a case of circumstantial evidence, where plaintiff has proved enough 'to get to the jury', and where the inference of negligence, though not necessarily a required one, is a permissible one in the balance of probabilities."

To recapitulate, the doctrine of *res ipsa loquitur* is invoked when:

1. An instrumentality is in the exclusive control of defendant, and

2. An accident occurs which ordinarily would not occur if the one in control of the instrumentality uses due care in the operation and maintenance of that instrumentality.
3. No voluntary action on plaintiffs' part contributes to accident.

Appellees submit that the criteria for the rule has been met in the case at bar and the trial court's instruction based on *res ipsa loquitur* was correct in every respect.

It is further submitted that in view of the direct, forceful, and positive evidence given by Police Officer Boyd there is some doubt as to whether the plaintiffs need seek the help and support of the *res ipsa loquitur* doctrine. We quote directly from the record: (T.R. 133)

"Q. What was there to hold it then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

A. There was supposed to be a chain and lock on it, but there was nothing on it.

Q. At the time you saw it, there was nothing to hold it at all, was there?

A. That is right."

The testimony reveals that the trailer was being used to move equipment from Phoenix to Mesa Fair, a distance of only 15 miles. (T.R. 312). When the trailer went over the end of the bridge there was a sort of a rise and right after that the trailer suddenly veered to the left into the Gossnell car. (T.R. 122, 123, and 124). The jury had every right to infer from these facts that the trailer was not made secure to the ball of the trailer hitch on the truck and that when the trailer went over this rise in the

bridge it caused it to become disconnected. It had the right to infer that no proper precautions were taken to make the trailer more secure because of the short haul involved.

PROPOSITION OF LAW NO. 2.

UNDER ARIZONA LAW IT IS NOT NECESSARY IN ORDER TO ESTABLISH A MASTER-SERVANT RELATIONSHIP TO SHOW THAT THERE WAS A CONTRACT GIVING THE MASTER CONTROL OF DETAILS OF THE WORK OF THE SERVANT; NOR TO SHOW POWER TO HIRE AND DISMISS; NOR TO SHOW PROVISION FOR COMPENSATION OF THE SERVANT.

This contention on the part of the appellants is quite summarily disposed of by the case of *Baker v. Maseeh*, 20 Ariz 201, 179 Pac. 53. which is still the law in Arizona.

The undisputed evidence in the record reveals that the defendants were the owners of the truck used by the truck driver in towing the trailer in question. (T.R. 103, 204, 255, 270, 291, and 292).

In *Baker v. Maseeh*, supra, the court laid down the following rule:

"When plaintiff has suffered injury from the negligent management of a vehicle....., it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time and that the accident was occasioned by the fault of a stranger, an independent contractor or other person for whose negligence the owner would not be answerable."

The Court further stated:

"One who is damaged, either in person or in property, by an automobile negligently operated by some person other than the owner, is usually without information as to the relation between the driver and the owner. If he be required to make affirmative proof of the relation, he might never be able to do so, however just and meritorious a case he might have on account of the negligent operation of the vehicle.

".....we hold that proof of ownership is prima facie evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and using the vehicle in the business of the owner."

The court there further pointed out that it is not necessary to prove that such party was being compensated at the time in question. It was stated

"It is not essential that the agency presumed from proof of ownership should be a business agency, or the service a remunerative service."

During the course of the trial the defendants Siebrand vigorously denied that there was any relationship between them and the truck driver. (T.R. 270, 290, and 292). Notwithstanding these denials on the part of the defendants, there was one piece of physical evidence, which proved very damaging to the defendants, and which must of necessity have a profound effect on the jury in finding against the defendants on this particular issue. The testimony of the defendants revealed that while there were concessions owned by others which composed a portion of their circus and carnival, the rides in the show were owned exclusively by defendants Siebrand and under their exclusive control, and that William Siebrand, their nephew, had no connection with these rides. (T.R. 103, 104). *Police Officer Boyd testified that at the scene of the accident he observed what was inside of the trailer through a hole that had been torn in the trailer.* (T.R. 142) *and he stated that he observed rides equipment in the inner portion thereof.* His testimony to the effect that there was a hole torn in the trailer was corroborated by one of the defendants'

own witnesses, William Siebrand. (T.R. 251, and 252). This testimony revealed to the jury that the trailer in question, while it may have belonged to the nephew of the defendants, William Siebrand, was being used to transport equipment belonging to the defendants, and was being towed by one of defendants' trucks which the undisputed testimony offered by both sides reveals was driven by truck driver Carroll. This fact would quite clearly beyond any doubt whatsoever, conclusively establish that the truck driver at the particular time in question was acting for and on behalf of the defendants.

The court in the case of *Baker v. Maseeh*, supra, stated, concerning the duty of a defendant in a situation of this kind:

"The presumption of use and control arising from proof of ownership is not conclusive. It has the effect, however, to cast the burden of proof on the owner to show, if he can, that the negligent driver was not his servant or agent, or, if such servant or agent, he was not at the time using the vehicle in the business of the owner."

The defendants apparently did not meet this burden to the satisfaction of the jury.

The defendants in their brief (page 24) attack other evidence which tended to establish an agency relationship between the truck driver and the defendants on the ground that such evidence was incompetent. We specifically refer to the statement made by the defendant P. W. Siebrand to Mrs. Gossnell at the hospital to the effect that the truck driver was the man who was driving the truck for them that day. While counsel for the defendants first objected to any such testimony upon direct examination, he went into it very fully and developed it very thoroughly on cross-examination in at least three instances. (T.R. 91, 92, and 93). The same holds true with respect to the statement made by officer Boyd to the effect that the truck driver informed him that he was employed by Siebrand Brothers Circus and Carnival. While counsel for the defendant objected to the testimony in the

first instance (T.R. 126) he again developed it himself on cross-examination (T.R. 138) and his clients thus became bound by such testimony.

PROPOSITION OF LAW NO. 3

THE LIABILITY OF THE MASTER IS DERIVATIVE WHERE HE HIMSELF IS NOT GUILTY OF NEGLIGENT CONDUCT AND THE LIABILITY OF THE MASTER IS BASED SOLELY UPON THE NEGLIGENT CONDUCT OF THE SERVANT.

The contention of defendants that the liability of the master is limited to the amount recovered against the servant holds true where the master's liability is entirely derivative, that is to say, when it stems entirely from the acts of the servant and the master is not himself an active tortfeasor. We most wholeheartedly concur that this is a correct rule of law. That the result is otherwise, where the master is an active participant, is quite clearly pointed out by the Arizona Supreme Court in the case of *DeGraff v. Smith*, 62 Ariz. 261, 157 P. 2d. 342 where the court said:

" 'Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which independently of the acts of the servant, liability may be predicated'. There is no evidence in the case that the defendant DeGraff was guilty of an act of negligence on which, independently of the acts of the servant, liability may be predicated."

The question now posed in this case is this: were the defendants guilty of any independent negligent act, other than that arising from the conduct on the part of the truck driver? In analyzing the situation it is to be noted that the plaintiffs in their amended complaint allege two separate delicts. (T.R. 3 and 4). In the complaint it is alleged:

"On February 20, 1953, while plaintiffs were proceeding in their automobile in a northerly direction on the Tempe Bridge just north of the business district of Tempe, Arizona, defend-

ants so negligently, carelessly and wantonly MAINTAINED AND OPERATED their motor vehicle and heavily loaded trailer attached thereto, so as to cause said trailer to become disconnected, and run into the automobile of plaintiffs with great force and violence."

The two wrongs charged are failure to maintain and to operate properly. It is significant to note that defendants try to read a distorted meaning into the above paragraph of plaintiffs' complaint. They assert that the words "maintain and operate" are synonymous and therefore apply only to the defendant truck driver. It is clear that the complaint alleges two distinct acts of negligence since it is utter folly to urge that there was any attendant duty on the truck driver in the instant case to maintain the equipment. In this connection the Court's attention is invited to the case of *Morris v. American Liability Surety Company*, 185 Atl. 201; 322 Pa. 91. In that case, the Pennsylvania Supreme Court said that the word "maintain" means to preserve or keep in an existing state or condition, and embraces acts to prevent a decline, lapse or cessation from that state or condition, and has been taken to be synonymous with "repair."

Defendants had a duty to maintain the equipment in a good state of repair and to provide adequate safety measures so that the accident in question would not have happened. With this duty they alone are charged and a violation of this duty in the instant case caused the plaintiffs to incur the loss that occasioned this action. For a violation of this duty, the trial court saw fit to deny defendants' motion for a new trial on the basis that there was no negligence shown. It is fundamental that the appellate court will not substitute its judgment for that of the trial court where there is evidence to support the denial of a motion for a new trial.

PROPOSITION OF LAW NO. 4.

SEPARATE AND DISTINCT VERDICTS IN UNEQUAL AMOUNTS MAY BE RETURNED AGAINST TORTFEASORS

WHO ARE ACTIVE PARTICIPANTS WHERE TWO SEPARATE WRONGFUL ACTS ARE INVOLVED. IN SUCH A SITUATION THEIR LIABILITY IS SEVERAL.

In support of this proposition of law the defendants contend that they were not active participants in the wrong resulting in damages to plaintiffs. They state on pages (3, and 4) of their brief:

"The only possible theory upon which the defendants Siebrand could be designated joint tort-feasors is that they were negligent in failing to inspect the trailer-hitch on the truck and trailer."

The undisputed evidence reveals further negligence on the part of the defendants Siebrand. They are admitted owners of the truck that was pulling the trailer in question. (T.R. 103, 204, 255, 270, 291, and 292). The truck driver who was called as a witness in their behalf admitted that there were no safety chains on the truck in question. (T.R. 238). Officer Boyd cited the truck driver for having unsafe equipment on the highway, and a bond was posted and forfeited. (T.R. 127, 132, 139, and 141).

In addition to the foregoing direct evidence the plaintiffs have the assistance of the doctrine of *res ipsa loquitur*. As this Court stated in the case of *U. S. v. Johnson*, *supra*:

"A vehicle does not ordinarily capsize in this manner unless there had been negligence in inspection, maintenance or operation."

The trial Court in this case properly instructed the jury as follows on this particular point: (T.R. 319).

"The section of the Arizona Code provides as follows:

"No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required

by this section, AND SAID VEHICLE IS IN SUCH SAFE MECHANICAL CONDITION AS NOT TO ENDANGER THE DRIVER OR OTHER OCCUPANT, OR ANY PERSON UPON THE HIGHWAY." (Emphasis Supplied)

Ariz. Code. Annotated 1939, 1952 Cum. Supp., Sec. 66-183.

It is elementary that had the truck in question been equipped with proper safety chains the accident in question could have been avoided.

The defendants further assert that the plaintiffs did not allege negligence on the part of the defendants in their complaint. This contention was disposed of in reply to Proposition of Law No. 3.

The defendants in their brief cite many cases in support of the general rule that a judgment against joint tort-feasors must be one judgment and cannot be apportioned. *We concur that such is the law where only one distinct wrong is involved, and in a situation where only one single verdict is submitted to the jury in which it may return a verdict to compensate plaintiffs for such wrong. This is not the situation in the case at bar, inasmuch as in the instant case, two separate and distinct verdicts were submitted, and quite properly so, because of the separate and distinct acts of negligence involved and because the defendants were severally liable.* In support thereof, plaintiffs cite the case of *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111; 56 L. Ed. 1009; 32 S. Ct. 641, which appears to bulwark the legal authorities touching upon the particular points involved. The court there in a very thorough and comprehensive opinion, in part stated as follows:

"The common law imposes upon each joint tort-feasor the burden of bearing the entire loss which he, in co-operation with another, has inflicted. The injured person may sue those who co-operated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, AND MAY HAVE JUDGMENT FOR UNEQUAL SUMS AGAINST ALL WHO ARE JOINED IN THE SUIT. Or, if he sue one such wrongdoer and he recover

judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied. *Lovejoy v. Murray*, 3 Wall. 1; 18 L. Ed. 129; *Sessions v. Johnson*, 95 U.S. 347, 348; 24 L. Ed. 596, 597; *The Beacons Field*, 158 U.S. 303; 39 L. Ed. 993; 15 Sup. Ct. Rep. 860."

It is to be noted that although the decision in the *Old Dominion* case, *supra*, was handed down approximately forty years ago, it is still law and was cited in *Johnson v. Pullman Co.*, 200 Fed. 2d. 751, a 1953 decision.

Attention is further invited to the fact that Arizona has a statute squarely covering the matter, to-wit:

"21-1220. Joint or several judgment.....

When two (2) or more are sued as joint defendants judgment may be given against those as to whom the cause of action is proved; *when a several judgment is proper, judgment may be given for or against one (1) or more of the defendants.*" (Emphasis Supplied)

Attention is further invited to the fact that the defendants P. W. and Hiko Siebrand and the defendant S. J. Carroll each interposed separate answers and interposed entirely different defenses. (T.R. 6, and 7). The former interposed the defense that S. J. Carroll was not their agent, and denied that the truck and trailer were being operated with their consent or that they were engaged in a joint venture. Nor did the defendant S. J. Carroll DENY THAT HE ACTED AS AGENT OR SERVANT of the Siebrands, his main defense being that the accident was an unavoidable one insofar as he was concerned. The jury could very well under the evidence have concluded that there was little or no fault on the part of Carroll, the truck driver, and that if the defendants P. W. and Hiko Siebrand had not permitted the defective equipment to be operated on the highway, the accident in question would never have occurred.

If it were assumed, for the purpose of argument only, that there were any irregularity in the verdicts submitted, the de-

defendants are too late to take advantage thereof after a verdict has been recorded and judgment has been entered thereon. In *Flush v. Erie Ry Co.*, 110 F. Supp. 118, the court said:

“For had General Motors then raised any question as to the meaning of the special verdict or its possible inconsistency, the jury’s intent would have been lawfully and promptly ascertained by the court, as intimated, before the verdict was formally received. Were this intent of the jury then found to be unlawful, as inconsistent, as General Motors now contends, the jury’s attention would have been called thereto, the pertinent law explained, and such tentative error doubtless promptly corrected.....such party can hardly rely on a mere ambiguity in the verdict, as a basis for nullifying a trial.....with the consequent waste of time and money of all concerned, particularly in the light of the rule that a jury’s verdict is to be sustained, in the absence of irreconcilable conflict.”

In the case at bar, the trial Judge, while instructing the jury on April 16, 1954, instructed them further that they could bring in two possible verdicts, one for or against the defendants Siebrand and one for or against the truck driver. (T.R. 328). After the jury had retired to deliberate on its verdict, the District Judge stated (T.R. 329), “You may state your objections to the instructions, gentlemen”. At that time, counsel for the defendants P. W. and Hiko Siebrand made certain objections to instructions given and instructions refused by the District Judge. Counsel for the defendants P. W. and Hiko Siebrand did not at that time, when offered an opportunity to object to the form of the verdicts, make any attempt to interject an objection thereto. Counsel for the defendant Carroll, joined in all of the objections made by counsel for the Siebrands. (T.R. 328, 329 and 330). After the jury deliberated and returned their verdicts on April 16, 1954 (T.R. 18 and 19), the verdicts were read and recorded by the Clerk of Court and no poll was desired by either side and the jury discharged. Counsel for the plaintiff moved for judgment on the verdicts and it was duly entered, and counsel for defendants Siebrand made a motion for stay of execution of the

judgment. At no time after the submission of the verdicts to the jury and after the rendition of the verdicts was an objection made by counsel with respect to the alleged inconsistency of such verdicts. Appellants first raised this question on motion for new trial dated April 26, 1954, which was ten days after the rendition of the verdicts and this motion was argued before the District Court on May 17th, one month after the rendition of the verdict.

Appellees assert that by inviting error at the trial and at time of rendition of the verdicts, appellants have waived their right to bring this matter before the Court of Appeals. In support thereof, we quote from 3 Am Jur, Sec 393:

"An objection to the formal sufficiency of a verdict comes too late for consideration on review when not made until after the jury has been discharged, when it is too late for correction."

The trend of the more recent decisions is to give effect to the true intent of the jury. The defendants P. W. and Hiko Siebrand here attempt to distort, alter, and torture the intent of the jury by limiting the total damages to a sum of one hundred dollars (\$100.00), a perfectly ridiculous conclusion in view of the serious nature of the personal injuries and the large resulting monetary loss to the plaintiffs, more especially to the plaintiff, George Gosnell. In *Flush v. Erie Ry. Co.*, supra, a Federal decision where the defendants attacked a verdict claiming it was inconsistent because the jury found against two defendants in one verdict but found in favor of one defendant on its cross-claim, the court held in sustaining the verdict:

"Because of the obvious difficulty attendant upon any attempt to ascertain the true intent of a jury.....the rule must be borne in mind that every reasonable intendment must be indulged in to support a verdict, the two findings must be in irreconcilable conflict before they may be set aside. *Theurer v. Co.* 124 Fed. 2d. 494; *Bass v. Dehner*, 103 Fed. 2d. 28, 34; 5 Moore's Fed. Practice Sec. 49.04. P. 2211 (2nd Ed. 1951)."

It is to be noted that the Siebrands and the truck driver, from the very inception of this case, adopted two different theories, made two different answers, employed two different attorneys and asked for two separate verdicts. They cannot now be heard to complain.

PROPOSITION OF LAW NO. 5

THE VERDICT OF THE JURY FOR DAMAGES IS NOT EXCESSIVE, NOR WAS THE JURY ACTUATED BY PARTIALITY, PASSION OR PREJUDICE.

Defendants assert with respect to this proposition of law that the damages rendered against them were so unreasonable that the jury was actuated by passion and prejudice. Merely stating that a verdict is excessive does not make it so, nor is the size of the verdict alone evidence of passion and prejudice and the Arizona Supreme Court has so indicated. *Keen v. Clarkson*, 56 Ariz 437, 108 P.2d. 573.

The defendants lay great stress on the case of *Stallcup v. Rathbun*, 76 Ariz. 62; 258 P. 2d. 821. It should be noted that the special damages in that case in the way of medical expenses were only \$5,380.80 in comparison with those in the present case which run in excess of \$24,000 dollars as will hereafter more particularly appear. Further, in the *Stallcup case*, the trial judge ordered a remittitur. In the case at bar, the trial judge was also called upon at the motion for a new trial to grant such motion on the claimed ground of excessiveness of the verdict. This the trial judge refused to do and also refused to allow a remittitur in lieu of a new trial. The identical question posed in this appellate court was brought before the trial judge who had an opportunity to see and hear the witnesses. In his discretion, the trial judge refused to reduce the amount awarded plaintiffs against defendants.

The plaintiff George Gossnell was critically injured in that he sustained: a shattered knee, a compound comminuted fracture of

the femur, broken ribs, and a skull fracture. He was left with impaired memory as a result of the skull fracture. (T.R. 61, 62, 67, and 68). He was also left with a very stiff knee. (T.R. 67). He was in a critical condition. (T.R. 146). The femur was broken in 10 different places, and he also suffered a fracture of the fibula (T.R. 148). He was in pain practically all of the time he was in the hospital at Tempe, and also had an embolism and other complications which would knock him out for eight or ten days at a time. (T. R. 62). He was in pain and uncomfortable practically all of the time up to the date of the trial which was held some 14 months after he sustained the injury. (T.R. 12, 57, and 63) and was bedridden all of that time (T.R. 159, 152, 153, 167, 169, 178, 166, 169, and 171) and would continue to be for another year to a year and a half. (T.R. 173).

It would appear from the evidence introduced at the trial that, up to the period of time that the plaintiff George Gossnell had concluded with his medical treatment, a list of the special damages for both Mr. and Mrs. Gossnell would be as follows:

Medical expenses to date of trial.....	\$12,027.00
Damages to Automobile.....	1,474.00
Loss of wages for both Mr. and Mrs. Gossnell to date of trial.....	8,800.00
Loss of another year's wages for Mr. Gossnell during year or year and a half he would continue to be bedridden subsequent to date of trial.....	7,000.00
Medical expense for another year to year and one half that he would continue to be bedridden.	12,000.00
Total.....	\$41,301.00

Let it be further assumed that a minimum of \$15,000 was allowed by the jury for pain and suffering, which figure would be

conservative to say the least in view of Mr. Gosnell's long confinement, and the future confinement and pain and suffering he will have to endure. When the foregoing figure of \$15,000 for pain and suffering both past and future is added to the figure of \$41,301.00, representing the special damages, a sum total of \$56,301.00 is arrived at. This leaves a remaining balance of \$38,709.00 to be applied toward compensation for the permanent injury Mr. Gosnell sustained and future loss of wages and earning power. It is further to be noted that these damages were in part to compensate Mrs. Gosnell for her injuries. It will be recalled that it appeared from the mortality tables introduced at the trial that Mr. Gosnell had a life expectancy of 11 and some tenths years. (T.R. 182). If it were assumed that he would work for the entire 11 years he would earn \$77,000.00 in that his average annual earnings were \$7,000 per year (T.R. 60). The jury in arriving at its verdict apparently in awarding him a remaining sum of \$38,699.00 felt that it was all together fitting and proper to award him one half of the amount of what his total future earnings based on a life expectancy of 11 years would be. This sum would also have to compensate him for permanent injury, and future medical attention beyond the year or year and one half. Such an award it would appear was all together fitting and proper in view of the circumstances and therefore the trial court refused to disturb it. Was this an abuse of discretion? Appellees think not, when all of the facts are taken into consideration.

The following authorities are submitted in support of the verdict:

Back in the year of 1935 an award of \$76,112 was held not excessive for injuries to legs and other parts of body of a man sixty-one years of age whose medical expenses were \$16,112.00.

Fulton v. Co. (Mont.) 37 P. 2d. 1025

In a 1953 Federal decision *O'Donnell v. Great Northern Ry.*, 109 F. Supp. 590, where plaintiff had an expectancy of 16 years

and future earning could have been found to be \$50,000, medical expenses were \$3,431.81, loss of earnings were \$8,925.00 an award of \$65,000 was held not excessive.

In *Flush v. Erie R. Co.*, 110 F. Supp. 118, the court quite aptly stated:

"It would serve no useful purpose to cite authorities on damages, though it must, of course, be borne in mind that the dollar today is worth but half what it was a score of years ago."

The court in the *Flush* case awarded \$30,000 for a skull fracture which is merely one of the injuries involved in the case at bar stating:

"There is no total, or even substantial, disability which really affected plaintiff's earning a livelihood or even his domestic life."

In *Kieffer v. Blue Seal Chem. Co.* 107 F. Supp. 228, affirmed in 96 Fed. 2d. 614, an award of damages in the sum of \$250,000 for injuries resulting in permanent loss of earning capacity was held not so irresistibly excessive so as to give rise to the inference of passion and prejudice, or mistake on the part of the jury and the award was affirmed.

The Federal courts have time and again stated that an award of damages for personal injuries enjoys a large presumption of correctness. *In re Central Railroad of New Jersey*, 52 F. 2d. 20; and more emphatically have stated that the grant or denial of a new trial on the ground of excessive damage is a matter of discretion with the trial court and not a subject for review.

United States Supreme Court — *New York L. E. and W. R. Co. v. Winter's Adm'r.*, 125 S. Ct. 356, 143 U. S. 60; *Chesapeake & Ohio Ry. Co. v. Proffitt*, 36 S. Ct. 620, 241 U. S. 462. See also *Washington Times Co. v. Banner*, 86 F. 2d. 836, *Arizona & N. M. Ry. Co. v. Clark*, 207 F. 817, 125 C. C. A. 305;

affirmed, 35 S. Ct. 210; 235 U. S. 669. *Chicago E. & I. Ry Co. v. Devine*, 39 F. 2d. 537.

This Court has said it will not replace its inferences for those of the jury on the question of damages. *Sears Roebuck & Co. v. Hartley*, 160 F 2d 1019. See also *Consumers Power Co. v. Nash*, 164 F. 2d. 657, wherein the court of appeals stated that the District Court on motion for new trial should determine if the verdict was excessive and not the Circuit Court of Appeals.

It is respectfully submitted, that for the reasons hereinabove set forth the award of damages made by the jury in the instant case should be affirmed.

PROPOSITION OF LAW NO. 6

NO INCOMPETENT, IMMATERIAL OR PREJUDICIAL EVIDENCE WAS ADMITTED TO THE PREJUDICE OF ANY PARTY.

In support of this proposition defendants contend that the laws of the State of Arizona do not require the use of safety chains on trucks pulling trailers. It is obvious that by advancing such contention the defendants must be completely oblivious of Section 66-183. Ariz Code of 1952 Cum Supp. which provides:

“No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required by this section, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant, or any person upon the highway.”

As heretofore stated the truck driver was cited by Officer Boyd for having unsafe equipment. (T.R. 127, 132, and 139). The law required a safety chain, Officer Boyd stated. (T.R. 131). The purpose of safety chains is to take care of a situation where in case

the hitch breaks in any way, it would prevent the trailer from veering to either side. (T.R. 142).

It is to be further noted that the trial Judge gave an instruction based upon the evidence adduced at the trial which is substantially the foregoing section of the Arizona Code. (T.R. 319).

On page 43 of their opening brief defendants assign as error the evidence given by the truck driver relative to safety chains. Prior to the admission of this evidence counsel for both the defendants Siebrands and the truck driver very thoroughly cross-examined Officer Boyd on the matter of safety chains. Mr. Gibbons, attorney for the truck driver asked: (T.R. 131).

"Q. You said there were no safety chains there, is that right?

A. That is right."

The cross-examination was continued by Mr. Gibbons. (T.R. 131, 132, and 133).

Mr. Wilson, counsel for the defendants, himself put questions to the officer relative to safety chains. (T.R. 140).

Counsel for the plaintiffs also questioned the officer relative to safety chains as follows: (All without objection from defendants' counsel T.R. 127).

"Q. And what did you find, or what did your examination of that equipment reveal?

A. I found that there was no safety chain, and there was no lock for the ball hitch at all on the trailer."

At no time during this colloquy did defendants' counsel, Mr. Wilson, object to the introduction of such evidence.

Appellees submit that in any event, the answers given and the questions asked were not prejudicial but provided another link

in the chain of evidence to show the negligence of defendants P. W. and Hiko Siebrand in failing to provide adequate safety measures which failure led to the accident in question.

Suffice it to say that appellants waived their right to raise this question in the appellate court by their own inaction (assuming for the purpose of argument it was inadmissible, which plaintiffs deny) and consent in the trial court. See 3 Am. Jur., Sec. 872, page 417 et seq.

PROPOSITION OF LAW NO. 7

STATEMENT OF ONE PARTNER THOUGH MADE OUTSIDE OF PRESENCE OF OTHER PARTNER WILL BECOME COMPETENT WHERE NO OBJECTION IS MADE TO SAME AND SIMILAR EVIDENCE IS INTRODUCED BY THE PARTNERS.

Defendants urge as error evidence relating to the conversation which took place between Fred Clark and P. W. Siebrand two days after the accident in question. Mr. Clark testified through deposition that P. W. Siebrand stated he would pay all damages, and buy the plaintiffs a new car. (T.R. 112). Here again defendants by their own conduct prior to the admission of such evidence brought out these identical facts for which they now claim error. Cross-examination of Mrs. Gossnell by Mr. Wilson (T.R. 98) was as follows:

“Q. I will ask you if Mr. Clark said to you when he returned from seeing Mr. Siebrand that he said to Mr. Siebrand:

‘I understand you wish to see me.’

And that Mr. Siebrand had said to him, ‘I do.’ And that he said, ‘And I am so sorry about this accident.’

And that he told Mr. Siebrand that Mrs. Gossnell had said that Mr. Siebrand wanted to see him. And that Mr. Siebrand said he was so very sorry about the accident, and

that he was going to stand all damages, and would buy them a new car at once, because theirs was wrecked beyond repair.

Didn't he tell you that when he came back from Mesa?

"A. I think he told my husband.

"Q. I don't care about that. Did he tell you?

"A. I don't remember whether he told me or not."

Furthermore, Mr. Breen the attorney for the defendants upon the taking of the deposition of the witness Clark, while he objected to the admission of this same testimony in the first instance brought the very same out again upon his cross-examination of Clark (T.R. 117) as follows:

"Q. And how he was going to replace the car, or who was going to do about damages, or who was going to pay for them, he didn't say?

A. He said he would take care of the damages. He said, "I will take care of all damages and will replace the car at once. And if you wish me to say, he further said, "I hope we don't get lawyers into the case because it will drag through the courts for several years."

The defendants further urge prejudicial error as to the statement made by P. W. Siebrand on the occasion when the truck driver and he came to see Mrs. Gossnell at the hospital a day or so after the accident. On that occasion the testimony reveals that Mr. Siebrand introduced the truck driver as the man who was driving the truck for him that day. Mr. Wilson counsel for the defendants again introduced this same evidence and developed it again upon cross-examination of Mrs. Gossnell (T.R. 91) as follows:

"Q. A while ago your counsel asked you if Mr. Siebrand came there with Mr. Carroll, and then you reiterated some conversation that Mr. Siebrand made with you while he was there.

Would you tell us again what that was?

- A. Mr. Siebrand introduced me to Mr. Carroll and said, "This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you."

This was gone into again by defendants' counsel. (T.R. 92).
3 *Am. Jur.*, Section 873, states unequivocally that:

"The right to complain of error in the admission of evidence may be waived, also, by introducing similar evidence in opposition."

The *Am. Jur.* citation above referred to cites a host of cases in support of this rule of law.

Also at 3 *Am. Jur.*, Section 879, page 430, the often expressed rule on this point is quoted:

"An appellant cannot complain of error in the admission of evidence which he himself offered or drew out."

PROPOSITION OF LAW NO. 8

THE RELATION OF JOINT ADVENTURERS IS CREATED WHEN TWO OR MORE PERSONS COMBINE THEIR MONEY, PROPERTY OR TIME IN THE CONDUCT OF SOME PARTICULAR LINE OF TRADE, OR FOR SOME PARTICULAR BUSINESS DEAL AND SHARE IN THE PROFITS.

Defendants in this proposition of law attempt to discredit the court's instructions on the liability of joint adventurers. In doing so, they cite the case of *Gottlieb Bros., Inc. v. Colbertson*, 152 Wash. 205, 277 P. 447, to support their contention that the joint adventurers must share in the losses as well as the profits of the enterprise. That case is in no wise connected with tort liability of a joint adventurer, but the theory set forth is in contract. Appellants also quote 30 *Am. Jur.*, page 682, Section 12, to the effect that at common law joint adventurers share in both profits and losses. We call the Court's attention to this same authority, Volume 30 *Am. Jur.*, page 682, Section 12, where it is stated:

"There is authority, however, that the sharing of losses is not essential, or at least, that there need not be a specific agreement to share the losses, and that if the nature of the undertaking is such that no losses occur, an agreement to divide the profits may suffice to stamp it as a joint adventure, although nothing is said about sharing losses."

At page 47 of their brief defendants state:

"It has been declared that at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses."

It should be particularly noted that such a definition could not be considered satisfactory or adequate because the common law did not recognize the relationship of co-adventurer. *O. K. Boiler and Welding Co. v. Minnetonka Lumber Co.* (Okl.), 229 Pac. 1045.

The question arises did the jury have a right to infer from the evidence presented that the defendants, P. W. & Hiko Siebrand, and their nephew, William Siebrand, were joint adventurers? The facts revealed that the defendants were the owners of the truck in question. (T.R. 103, 204, 255, 270, 291, and 292) and that William Siebrand was the owner of the trailer, (T.R. 248). The testimony further revealed that the trailer, although same was owned by the nephew William Siebrand, contained rides equipment. (T.R. 142). The testimony further revealed that the defendants Siebrand were the only owners of the rides (T.R. 103, 104). It would thus appear that they were engaged in promoting an enterprise together and for their mutual benefit, and to that end were acting in concert. William Siebrand further had a sign painted on the side of the trailer which read: "Siebrand Brothers Carnival and Circus." (T.R. 256). So from this entire picture the jury had a right to infer and make proper inferences for either party, and they apparently resolved same in favor of the plaintiffs.

Defendants also make much of the fact that the payments by William Siebrand to the defendants should be termed "rent" as

distinguished from "profits". This again upon the whole evidence was a question of fact for the jury which it again resolved in favor of the plaintiffs.

The rest of defendants' assignment of error is based primarily on the proposition that the trial court incorrectly instructed the jury as to what constituted a joint adventure. Appellants' main point is to the effect that a correct definition was not included in that the element of "losses" was left out of the instructions relating to joint adventure. As plaintiffs have heretofore pointed out, the fact that a joint adventure includes no agreement to share losses is not essential.

A reading of all the instructions submitted to the jury will readily reveal that the trial judge in the instant case was careful to give to the jury all the necessary rules of law applicable in order for them to arrive at a verdict based upon the evidence.

The test of correctness of the instructions submitted to the jury, is whether upon the whole charge the jury will gather the proper rules to be applied in arriving at a correct decision. *Greyhound Lines v. Zane*, 160 F. 2d. 731; *Woodward v. U. S.*, 167 F. 2d. 774.

More emphatically, it can be stated that if the instructions as a whole substantially and correctly cover the law applicable to the issues, and if the law has been fairly and correctly presented, a judgment will not be reversed on appeal even though the instruction may be open to criticism. *Magee v. Fasulis*, 65 Cal. App. 2d. 94; 150 P. 2d. 281.

It is also very important to note that the court not only instructed the jury on the issue of joint adventure but also instructed the jury to the effect that proof of ownership of the vehicle causing damage constituted prima facie evidence that the driver thereof was an agent or servant of the owner, and as such was presumed to be using same in the business of the owner. (T.R. 322). The court further instructed the jury that the creation of an agency relationship could arise from the consent of the parties; and that

it was not essential that any actual contract should exist, or that compensation should be expected by the agent, and that the assent of the parties thereto may be express or implied. (T.R. 323). The court further instructed the jury that the burden of proof is cast on the owner to show, if he can, the negligent driver was not his agent or servant (T.R. 324).

It will thus be seen that the court not only instructed the jury on the joint adventure theory but also upon the agency theory, the latter springing from the fact that the defendants were the admitted owners of the truck which was being driven by the truck driver at the time of the accident. *Baker v. Maseeh*, supra.

It is to be further noted that the evidence quite readily supported both theories and it was entirely correct and proper for the trial court to instruct the jury on every issue supported by the evidence.

Plaintiffs submit to the Court that defendants were not prejudiced by the instructions given to the jury by the trial court when all the instructions are read as a whole, and that there was no resulting prejudicial error.

PROPOSITION OF LAW NO. 9 OF APPELLANTS
SIEBRAND

PROPOSITION OF LAW NO. 1 OF APPELLANT
S. J. CARROLL

DENIAL OF MOTION FOR THE SATISFACTION OF
JUDGMENT IS NOT APPEALABLE

Both appellants Siebrand and Carroll would have this court declare that the trial court erred in refusing to grant the appellant Carroll's motion for satisfaction of judgment. This is nothing more than saying that the trial court has no discretion in the matter. With this plaintiffs disagree.

Appellants novel approach on this question presents no ground for appeal in any event.

In *Topeka Morris Plan Co. v. Hill*, 148 Kan. 295; 80 P. 2d. 1049, the trial court denied defendants motion for satisfaction of judgment pursuant to a statute of Kansas. The appellate court stated that this was solely within the trial court's discretion and presented nothing open to appellate review. As plaintiffs later point out, this is also the Federal rule.

Significantly, appellants Siebrand in their motion for new trial, did not raise this question of satisfaction of judgment. (T.R. 44).

Appellant Carroll did not institute a motion for new trial, but instead made a motion for satisfaction of judgment. (T.R. 46).

Rulings upon motions to require the court to satisfy a judgment of record after payment of the judgment into court by the movant are not subject to appeal. Judicial Code Section 128, 28 USCA, Section 225, now section 1291 et seq. In particular, we quote from *Hatzenbuehler v. Talbot*, 132 F. 2d. 192, where 7th Circuit Court of Appeals was asked to rule on this identical issue and we quote therefrom:

"At the very outset we are confronted with the question of whether this was a final judgment from which appeal lies to this court. We have only such appellate jurisdiction as Congress has granted us. By 28 U. S. C. A. Sec. 225, it is provided that we shall have jurisdiction to review by appeal final decisions of the District Courts of this Circuit. If the order in question is not a final decision, we have no jurisdiction."

"This action of the court on the motion in the case at bar is not the final determination of the rights of the parties to have this judgment satisfied. The motion might be renewed at any time. In the instant case, nothing was settled except the particular motion then before the court."

"It seems clear that the order appealed from was not a final decision within the meaning of 28 U. S. C. A. Sec. 225. The appeal is dismissed for want of jurisdiction."

Appellant Carroll's specification of error Number 1 on page 3 of his brief states "The Court erred in denying the motion of the truck driver Carroll for satisfaction of judgment, after Carroll had paid the full amount of the judgment against him into court----"

Appellants Siebrand made the identical specification of error. Their Specification of error is Number XVII on page 17 of their brief.

It is quite evident from the record, that this order appealed from was not a final decision within the meaning of 28 U. S. C. A. 225 and therefore both appellants Siebrand and Carroll cannot invoke the jurisdiction of this appellate Court.

Section 225 herein referred to can now be found in 28 U. S. C. A. Sec. 1291 et seq. Plaintiffs, however, refer to Sec. 225 as it appeared in the *Hatzenbubler* case, *supra*.

The principle stated in the *Hatzenbubler* case was reiterated in *Jareki v. Whetstone*, 192 F. 2d. 121.

Appellees respectfully submit that appellants Siebrand's Proposition of Law No. 9 and appellant Carroll's appeal are not such orders within the meaning of 28 U. S. C. A. 1291, in that they are not final orders.

Not being a final order, appellant Carroll's appeal should be dismissed and defendants Siebrand's proposition of law number 9 should be stricken.

CONCLUSION

Plaintiffs George and Estella Gosnell respectfully point out to this Court that defendants have had a fair and impartial trial on all the issues submitted. Defendants have been found to be in fact and in law guilty of negligence proximately resulting in this grave misfortune from which plaintiff George Gosnell suffered and

continues to suffer. Therefore, they respectfully pray that the judgment of the District Court of Arizona be affirmed in every respect.

RESPECTFULLY SUBMITTED,

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Attorneys for Appellees.

IN THE
**United States
Court of Appeals**

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND
BROTHERS CIRCUS and CARNIVAL,
Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CAROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

**Reply Brief of Appellants, P. W. Siebrand
and Hiko Siebrand.**

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Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

No. 14468

Reply Brief of Appellants, P. W. Siebrand and Hiko Siebrand.

*(Figures in Brackets refer to
page of the Transcript of Record)*

The appellants, for the sake of clearness, will continue to use the same designation of the parties, as used by appellants in their opening brief and appellees in their brief, to-wit: P. W. Siebrand and Hiko Siebrand the appellants being referred to as "the defendants", and the appellees George F. Gossnell and Estella Gossnell being referred to as "the plaintiffs." The appellant S. J. Carroll is referred to as "the truck driver."

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 1

Plaintiffs accept and agree with the defendants' basic premise set forth in Proposition of Law No. 1 that the doctrine of *res ipsa loquitor* has no application where the cause of the accident is unexplained, and might have been due to one of several causes, for some of which defendants are not responsible; but urge that it has no support from the facts of the case. We direct the Court's attention to our opening brief to answer this contention.

Plaintiffs cite *Weedle v. Loges*, 52 Calif. App. 2d, 115, 125 Pac. 2d, 914, which case in turn cites from an earlier California case, *Speidel v. Lacer*, 2 Calif. App. 2d, 528, 38 Pac. 2d, 477. In *Speidel v. Lacer, supra*, the plaintiff was injured by a defective automobile hoist installed by Lacer and operated and maintained by the Standard Oil Company. The Court held the doctrine of *res ipsa loquitor* inapplicable, and, in this regard, stated:

“When a thing which causes injury without fault of the injured person is shown to be under the *exclusive control of the defendant* and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.”

At page 9 of their brief, plaintiffs quote from *Weedle v. Loges, supra*, part of which is as follows:

“It has been held that the doctrine of *res ipsa loquitor* may not be invoked where there is a divided

responsibility and the negligence is in part that of a third party over whom defendant has no control.”

Defendants urge that the statements from the *Weedle* and *Speidel* cases above quoted are in direct support of defendants’ contention that the doctrine of *res ipsa loquitor* has no application in this case. It should be remembered that the trailer belonged to William Siebrand (T.R. 248 and 250), who was not one of the defendants in the case. There was absolutely no evidence that the trailer hitch on the truck which belonged to Pete and Hiko Siebrand was defective. Moreover, the only testimony concerning the trailer hitch on the truck was that such hitch was in good working order after the accident and in no way contributed to the accident (T.R. 238). Thus, we have a case where there is a divided responsibility, and the negligence, if any, is in part that of a third party, over whom defendants had no control and was not made a party to the action.

At page 10 of plaintiffs brief, they quote from page 133 of the Transcript of Record, and urge that, even in the absence of *res ipsa loquitor*, there is sufficient evidence of negligence on the part of the defendants. Again, it is to be noted that the evidence refers to the trailer owned by William Siebrand. It likewise states that there was no chain and lock on it. In spite of the fact that the judge instructed counsel that he could find no law requiring safety chains (T.R. 143), they persist in advancing the theory that there is such a law, and rely on it to establish defendants negligence.

Defendants re-assert that the facts of this particular case do not fall within the doctrine of *res ipsa loquitor*, and in the absence of such doctrine the plaintiffs have

wholly failed to prove negligence on the part of the defendants.

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 3

Counsel for plaintiffs do not dispute the contention of the defendants that the liability of the master is limited to the amount recovered against the servant where the master's liability is entirely derivative and unequivocally concur in this statement of law. Their entire disagreement with defendants' proposition of law No. 3 is their contention that the defendants were guilty of independent acts of neglect other than those arising from the conduct of the truck driver. In admitting this proposition of law, which is the universal rule concerning the matter, we respectfully represent that plaintiffs have admitted that the judgment in this case can be no greater against the defendants than the one hundred dollars assessed against the truck driver. As stated in our opening brief, the plaintiffs did not allege or prove any independent acts of negligence on the part of the defendants. It is to be noted that the only paragraph alleging negligence on the part of the defendants is set forth on pages 14 and 15 of appellees' brief, and on page 33 of appellants' brief. The pertinent part of this particular allegation states:

“That on February 20, 1953, while plaintiffs were proceeding in their automobile in a Northerly direction on the Tempe Bridge * * * defendants so negligently, carelessly and wantonly maintained and operated their motor vehicle and heavily loaded trailer attached thereto, * * *”

This allegation could only refer to the particular time and place, while plaintiff's car was on the Tempe

Bridge and the truck was either on the bridge or rapidly approaching the bridge. The only possible negligence of the defendants could be the acts of the truck driver, inasmuch as they were not present at the time. If plaintiffs had intended to allege negligence on the part of the defendants in failing to keep the truck and the trailer properly in repair, they should have inserted a separate paragraph so stating. Plaintiffs cite the case of *Morris v. American Liability Surety Company*, 185 Atlantic 201, 322 P.A. 91, as defining the word "maintain". In this case, the word "maintain" was defined as used in a policy of insurance. We don't disagree with the definition given therein, as one of the definitions of the word "maintain", but contend that such definition has no application to the way in which the word was used in the allegation of plaintiffs' complaint. In *Evans v. Byrally Transp. Co.*, 197 A, 758, 124 Conn. 10, the Court considered the question as to whether or not the plaintiff had alleged that defendant's truck was moving or stationary. The complaint stated,

"The operator was negligent in that he operated and maintained the truck without lights in the rear; that stopping and parking it on the traveled part of the highway constituted a dangerous obstruction."

The Court held that the words "operated" and "maintained", as used in the allegation in the complaint, did not mean that the truck was moving. The Court stated,

"Most common words are used in different senses according to the context in which they appear."

We assert that the plaintiffs used the words "operate" and "maintain" in their complaint to signify the

truck driver's conduct at the particular time the car and truck were approaching the Tempe Bridge.

We refer the Court to defendants' opening brief, under this proposition of law, supporting the view that there was no evidence of the defendants' negligence independent of the imputed negligence of the truck driver. It should be remembered that the trailer did not belong to the defendants, and they were under no obligation to keep it in good repair. The truck driver hooked up the truck and trailer, in the absence of the defendants, (T.R. 205) and if there was any negligence in this respect, either as to the failing to properly connect the truck and trailer, or failing to notice a defect in the trailer hitch, such negligence was that of the truck driver, and could only be imputed negligence insofar as the defendants were concerned.

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 4

Plaintiffs continue to urge, in opposition to this proposition of law, as they have done before, and consistently did throughout the trial, that defendants were negligent because of the absence of safety chains. This argument will be considered in connection with Proposition of Law No. 6.

Under this proposition of law, defendants, in their opening brief, cited many cases to support the statement that damages against joint tort feors cannot be apportioned, but must be for a lump sum and in the same amount against all such joint tort feors. All of these cases were instances where inconsistent verdicts were awarded by the jury against joint tort feors,

and the appellate court reversed such inconsistent verdicts as being contrary to law. Plaintiffs ignore these—cases and cite *Bigelow v. Old Dominion Copper Mining and Smelting Company*, 225 U.S. 111, 56 Law Ed. 1009, 32 Supreme Court 6417, on page 17 of their brief; and *Johnson v. Pullman Company*, 200 Fed. 2d 751, on page 18 of their brief, to support their contention that a judgment may be assessed in unequal sums against all who are joined. The *Bigelow* case turned on two points. First, that the judgment in favor of one tortfeasor creates an estoppel as to the other defendant. Second, does the failure to give credit to such judgment in another case deny full faith and credit? We submit the case is not in point. It does not concern a judgment for unequal sums between two joint tortfeasors, and it does not hold that the judgment can be unequal against two joint tortfeasors. Likewise, the case of *Johnson v. Pullman Company*, *supra*, is not in point. It concerns the question of estoppel by judgment. The question of unequal verdicts is not in issue or even mentioned.

Plaintiffs, at page 18 of their brief, urge that Arizona has a statute which covers the matter. A reading of the statute by itself clearly controverts this argument. The statute doesn't mention apportionment of damages. The statute does nothing more than abrogate the old common law rule that required a judgment in an action against several defendants to be against all or none. 49 CJS, Sec. 33, page 75. The *Bigelow* and *Johnson* cases, and the Arizona statute, are the only authorities cited by the plaintiffs in opposition to defendants' proposition that the judgment against two joint tortfeasors cannot be apportioned; and we submit that those authorities are not in point.

On page 18 of their brief, plaintiffs assert in bold type that the defendant S. J. Carroll did not deny that he acted as agent and servant of the Siebrands. This statement is not true. (T.R. 203, 204, 205).

Plaintiffs next urge that defendants are too late to take advantage of the inconsistent verdicts after judgment has been entered thereon. They cite *Flush v. Erie Railroad Company*, 110 Fed. Sup. 118, to support this contention. In this case, the court tried two actions together—a negligence case and an indemnity case. Before and after receiving the verdict, the court inquired of counsel whether they desired the court to ascertain more clearly the meaning of this lengthy verdict. Counsel expressed no such desire. The court further held that the special verdict in the indemnity case was not in irreconcilable conflict with the general verdict in the negligence action. In addition to this, the court held that where the jury's verdict is in irreconcilable conflict, the verdict cannot be sustained. Plaintiffs, at page 19 of their brief, state that the defendants failed to object to the form of the verdicts when they had an opportunity to do so. The submitted forms of verdict are found on page 328 of the Transcript of Record, and the verdicts as submitted are not necessarily inconsistent. They only became inconsistent when the jury found against both the defendants P. W. Siebrand and Hiko Siebrand and the defendant S. J. Carroll and assessed damages in different amounts.

It is also true that the plaintiffs failed to object to the form of verdict, and, likewise, failed to request that the jury, upon return of the verdicts, be instructed to return to the jury room and clarify the verdicts; but,

rather, the plaintiffs moved for a judgment on the verdicts as returned.

The plaintiffs cite *Volume 3, Am. Jur., Sec. 393, at page 126*, as supporting the theory that an objection to the formal sufficiency of a verdict comes too late for consideration on review when not made until after the jury has been discharged. *Walter v. Louisville Railroad Company*, 150 Ky. 652, 150 S.W. 824, is one of the cases in the footnote purporting to sustain this statement of law. In that case, the jury brought in the following verdict,

“We the jury do not find the defendant guilty.”

The plaintiff contended that this verdict was ambiguous, and, in effect, constituted a hung jury. The court could not agree with this contention, but stated that any objection to the formal sufficiency of the verdict should have been made before the jury was discharged so the jury could have clarified such mistake. The other case cited in the footnote of *Am. Jur.* likewise turns on the formal sufficiency of the verdict. In *State v. Amidon*, 2 A. 154, 58 Vt. 524, a formal defect was defined as follows:

“It is obvious without illustration that a defect that does not effect the merits of the case or the evidence necessary to be given to maintain the indictment could be regarded as only formal.”

We submit that the inconsistent verdicts found by the jury in this case go far beyond a mere formal defect. In all of the cases cited by plaintiffs to support their contention, the statement is found that before the verdict may be set aside, there must be an irreconcilable

conflict. In the many cases cited by the defendants under this proposition of law where the verdicts were inconsistent and very similar to the one in the present case, there was not one instance where the court refused to consider the matter because an objection was not made before the jury was discharged.

Plaintiffs conclude their argument on this proposition of law by commenting that the defendants and the truck driver, from the inception of the case, adopted two different theories, filed two different answers, employed two different attorneys and asked for two separate verdicts. We fail to see that this has any significance whatsoever. There was only one tort and one accident wherein the plaintiffs were injured. If the defendants and the truck driver were both guilty of negligence, and such negligence was the proximate cause of the injury, then they were joint tort feasons, and the judgment against both should be in the same amount. If the truck driver was not negligent, then the jury should have exonerated him completely. The jury acted clearly beyond its lawful authority in returning two wholly inconsistent verdicts. 86 C.J.S., Sec. 34, page 949.

Reply to Appellees' Argument On Proposition of Law No. 5

Plaintiffs' argument, directed to Proposition of Law No. 5, is two-fold. First, that the judgment is reasonable; and, second, that the question of excessive damages cannot be raised on appeal. It is interesting to note that on page 22 of their brief, plaintiffs set forth certain items of damages totalling \$41,301.00; yet, failed to indicate the pages of the Transcript where testimony

was adduced supporting such amounts. The reason for this omission is obvious. Only the first two items, in the amounts of \$12,027.00 and \$1,474.00, were substantiated by the evidence. Mr. Gosnell testified that he was still receiving his commissions from his customers, even though he had not been working (T.R. 70); and there was absolutely no testimony as to the amount of future medical expenses or to the amount of future earnings that the plaintiff George Gosnell would lose. As a matter of fact, there is no evidence that the plaintiff George Gosnell will have any definite permanent injury (T.R. 173, 174).

In support of plaintiffs' contention that the matter of excessive damages is not subject to review, they cite, on page 24, in re *Central Railroad of New Jersey*, 52 Fed. 2d 20; yet, it is significant that in that very case the Second Circuit Court of Appeals stated, with the Honorable Learned Hand as one of the judges, in a per curiam decision,

“Award of damages for personal injuries, though enjoying a large presumption of correctness, may be changed by appellate court on review.”

And in this particular case, the appellate court reduced the judgment of one plaintiff from nine thousand to sixty five hundred, another from fifteen hundred to eight hundred, and another from six hundred to four hundred; stating in each instance that the verdict was excessive. In the case of *Earl W. Baker and Company v. Lagaly*, 144 Fed. 2d 344, the Tenth Circuit Court held,

“In a death action the verdict will not be disturbed on appeal for excessiveness unless it is so

plainly excessive as to suggest that it was the result of passion or prejudice on the part of the jury.”

In *Alabama Great Southern Railroad Company v. Johnson*, 140 Fed. 2d, 968, the Fifth Circuit Court of Appeals stated:

“The appellate court may not relieve against excessive verdict merely because it is excessive, but large size of verdict justifies appellate court’s careful scrutiny of errors specified which may have produced it.”

We respectfully urge that by the jury returning a verdict of one hundred dollars against the truck driver, who presumably had nothing, and ninety five thousand dollars, against the defendants, who were the owners of the circus, the conclusion is obvious that the jury could have only so acted as a result of bias and prejudice.

Reply to Appellees’ Argument On Proposition of Law No. 6

Appellees answer appellants’ argument in connection with the Proposition of Law No. 6 by insisting that the law of the State of Arizona does require safety chains and cites Section 66-183, Ariz. Code of 1952, Cum. Supp. as supporting this proposition. We respectfully urge the court that this section of the Arizona Code does not require safety chains; and the court stated to counsel during the trial that he was unable to find any section of the Arizona Code which required a trailer to be connected to a truck with safety chains. (T.R. 143) Apparently the only authority that plaintiffs can cite that requires safety chains is the testimony of Officer Boyd, and counsel for plaintiffs does cite such testimony on page 25 of their brief as authority

to support their contention. This, of course, is preposterous, and has absolutely no effect whatsoever. Yet, counsel, during the trial, repeatedly maintained that safety chains were necessary and required by law. Likewise throughout plaintiffs' brief they have consistently maintained that the defendants were negligent because they failed to use safety chains. It was after these repeated attempts by plaintiffs to insist that safety chains were necessary that defendants objected to such statements. Plaintiffs cite Sec. 3 Am. Jur., Sec. 872, page 417, as supporting their contention that defendants have waived any objections to the testimony concerning safety chains. The first sentence of this section reads:

“The necessity of presenting and reserving questions in the lower court and the effect of failure to do so have been considered at length in an earlier part of this article. As is there pointed out in detail, failure of the injured party to call the attention of the trial court to an alleged error at the time when it occurs, or at least while it is still within the power of the trial court to correct it, amounts, ordinarily, to a waiver of the error or creates an estoppel against bringing it to the attention of the appellate court.”

As stated at page 43 of defendants' opening brief, counsel for defendants did object to plaintiffs' repeated questions concerning safety chains. (T.R. 238) At this stage of the trial, it was not too late for the trial court to correct the error. If it had sustained the objection that the question as to safety chains was immaterial, then the jury would have realized that it was not necessary that the defendants have safety chains; but by overruling the objection, the trial court impliedly indicated that safety chains were required by law, and by so doing prejudiced the defendants.

Reply to Appellees' Argument On Proposition of Law No. 7

Plaintiffs' argument on Proposition of Law No. 7 is based upon statements from 3 Am. Jur., Sec. 879, page 430, and 3 Am. Jur., Sec. 873, page 419, to the effect that the right to complain of error in the admission of evidence may be waived by introducing similar evidence in opposition; and that the appellant cannot complain of error in the admission of evidence which he himself offered or drew out. Concerning the testimony given during the deposition, on page 28 of plaintiffs' brief, such testimony was only gone into by the defendants on cross examination after such testimony had already been admitted over defendants' objection. The direct testimony and objection thereto is found at page 111 of the Transcript of Record. The matter on cross examination is found at page 117 of the Transcript of Record. Likewise, the alleged statements of Mr. Siebrand, found at pages 28 and 29 of plaintiffs' brief, to the effect that Mr. Siebrand introduced Mr. Carroll to Mrs. Gossnell, as,

“This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you.”

At page 81 of the Transcript of Record, this matter was introduced by the plaintiffs and objected to by the defendants. The defendants went into the matter in an attempt to impeach or explain on cross examination, at page 92 of the Transcript of Record. We respectfully submit that the rule of law stated by the plaintiffs does not prevent a party from inquiring, upon cross-examination, in an attempt to explain or contradict such state-

ment, without waiving his original objection. In 3 Am. Jur., Sec. 873, at page 422, it is stated:

“Error in allowing the plaintiff in a personal injury case calling the defendant as a witness, to examine him as to his wealth is not waived by the defendants examination in his own behalf, amounting to nothing more than additional cross-examination to explain some of the matters brought out in his examination by the plaintiff, and being directed not to the amount of his property, but to the character of his interest therein;”

By prohibiting a party, on cross-examination, from attempting to explain certain damaging testimony improperly admitted on direct examination, unless such party waived his original objection, would be grossly unfair; and, perhaps, force the party into an appeal when the matter could have been adequately explained.

Reply to Appellees' Argument On Proposition of Law No. 8

The plaintiffs' attempt to summarily dispose of the case *Gottlieb Brothers, Inc. v. Culbertson*, 152 Wash. 205, 277 Pac. 447, cited and relied upon by the defendants in their opening brief, by stating that the case concerns liability of joint adventures in contract and not in tort. This is no answer at all. The elements necessary to constitute joint adventure are the same, and must be present before a joint adventure exists. After a joint adventure is in existence, then liability is determined according to the law of torts or contracts. Just as in a partnership, the law of contracts or torts does not determine whether a partnership is in existence, the law of partnership is controlling in such a matter. We submit that the rules of law set forth in the

Gottlieb case, concerning joint adventure, are proper statements of the law, and stand unrefuted by the plaintiffs. The *Gottlieb* case is very similar to the present case, and, as stated in our opening argument under this proposition of law, the court erred in failing to give plaintiffs' requested instructions concerning joint adventure based on the *Gottlieb* case. We think it is significant that plaintiffs have failed to cite a single case stating that sharing the losses is not an element of joint adventure.

At page 30 of the plaintiffs' brief, they cite *O. K. Boiler and Welding Company v. Minnetonka Lumber Company*, (Okl.) 229 Pac. 1045, as supporting the proposition that the common law did not recognize the relationship of co-adventure. The statement in such case reads as follows:

“While it is true at common law the courts do not recognize the relationship of co-adventure, unless the elements of partnership were disclosed and proven, but in the passage of time, the rule has been liberalized by decisions of the court. See note to ann. cas. 1916a, page 1210.”

The case does not support the proposition for which it is cited.

Plaintiffs contend at page 30 and 31 of their brief that the question as to whether or not the payments by William Siebrand to the defendants was rent, as distinguished from profits, was a question of fact for the jury which the jury resolved in favor of the plaintiffs. Defendants attempted to get this specific question referred to the jury in their instruction No. 4, but the court refused to give the instruction; and, as pointed

out in our opening brief under this proposition of law, failure to give such instruction was prejudicial error against the defendants.

The plaintiffs cite no other cases in opposition to defendants' argument under Proposition of Law No. 8, except two cases stating the general law, that if the instructions as a whole substantially and correctly cover the law applicable to the issues, the judgment will not be reversed on appeal, even though the instruction may be open to criticism. In answer to this, we refer the Court to our original argument under Proposition of Law No. 8, where it is pointed out that a correct definition of joint adventure was not given, and the instructions that were given did not properly state the law concerning joint adventure. Our original argument also covered the question of the insufficiency of the evidence to establish a proper case of joint adventure, and this matter will not be discussed again in the reply brief, but we refer the Court to our opening brief under this proposition of law.

Reply to Appellees' Argument On Proposition of Law No. 9

The plaintiffs, in their argument in opposition to Proposition of Law No. 9, rely solely upon the theory that a court's order denying a motion for satisfaction of judgment after payment is not subject to appeal. In support of this proposition, they rely principally on the case of *Hatzenbuhler v. Talbot*, 132 Fed. 2d, 192, wherein the Seventh Circuit Court of Appeals did rule that such an order was not an appealable order. In this particular case, it was a three-judge court, and one of the judges dissented from the decision, stating that in

his opinion such an order was an appealable order. In *Lillie v. Dennert*, 6th Cir., 232 Fed. 104, it was held that an order entered upon a motion to require satisfaction of judgment is appealable. This same rule is also found in *Herrick v. Wallace*, 114 Ore. 520, 236 Pac. 471. Also, in 34 C.J., Sec. 1128, at page 731, it is stated:

“An order entered upon a motion to compel satisfaction of judgment is appealable, and at least in some jurisdictions may be reviewed by certiorari.”

We respectfully urge that this Court should follow the ruling in the case from the Sixth Circuit, and also the rule set forth in *Corpus Juris*, that an order entered upon a motion to compel satisfaction of judgment is an appealable order. To fail to so rule might well necessitate another appeal to this Court at a later date concerning the question as to whether or not the judgment against the defendants Siebrand has been satisfied.

CONCLUSION

For the reasons hereinabove set forth, as well as those discussed in our opening brief, we respectfully urge that this Court should declare that the judgment against the truck driver Carroll has been satisfied, and thus the judgment against the defendants Siebrand has been satisfied. Should the Court disagree on this point, we then urge the Court that a new trial should be granted, limiting the damages to be assessed against the defendants to the sum of one hundred dollars, the amount heretofore recovered against the truck driver Carroll. In the event the Court disagrees with the first two propositions, we submit that at least the defendants

are entitled to have the ninety five thousand dollar judgment reversed, and a new trial awarded. Should the Court likewise disagree with this contention, then we respectfully urge that the verdict against the defendants Siebrand is excessive and was granted under passion and prejudice and should be limited to a reasonable amount.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

DEERING-MILLIKEN & CO., INC., a corpora-
tion, Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a cor-
poration, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 352, inclusive).

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

OCT 29 1954

PAUL P. O'BRIEN,
CLERK



No. 14481

United States
Court of Appeals
for the Ninth Circuit

DEERING-MILLIKEN & CO., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
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[1*]

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In the United States District Court for the South-
ern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO., INC., a New York
corporation, JOHN DOE ONE, JOHN DOE
TWO, RICHARD ROE CORPORATION
ONE and RICHARD ROE CORPORATION
TWO, Defendants.

COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT

Comes Now Modern-Aire of Hollywood, Inc., a
California corporation, plaintiff in the above en-
titled action, and for cause of action against the
defendants, and each of them, complains and alleges
as follows:

I.

That at all times herein mentioned, the plaintiff
was and is now a corporation organized under and
pursuant to the statutes of the State of California,
maintaining its principal office for the conduct of
its business at 1112 Sentous Street, Los Angeles,
California; that at all times herein mentioned, the
defendant Deering-Milliken & Co., Inc. was and is
now a corporation incorporated under the laws of
the State of New York; that it maintains an office
for the transaction of business in the City of Los

Angeles, [2] County of Los Angeles, State of California; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00.

II.

That the defendants John Doe One, John Doe Two, Richard Roe Corporation One and Richard Roe Corporation Two are sued herein under fictitious names for the reason that plaintiff is ignorant of the true names of such defendants; that as soon as plaintiff ascertains their true names, plaintiff will ask leave of Court to amend and insert said true names in lieu of said fictitious names.

III.

That at all times herein mentioned, the defendant Deering-Milliken & Co., Inc. was engaged in the textile business pursuant to which it contracted with various and divers persons, including this plaintiff, to manufacture or have manufactured for said various and divers persons, including this plaintiff, textiles and textile products.

IV.

That on or about the 14th day of March, 1952, in the City of Los Angeles, County of Los Angeles, State of California, the plaintiff and the United States of America, by and through the Department of the Army, Los Angeles Ordnance District, made, executed and delivered a contract in writing pursuant to the terms and provisions of which the plaintiff agreed to manufacture and deliver to the

United States of America as aforesaid, 459,200 of a certain ordnance item designated in said contract as: "Liner, (Inner), Assembly, for case, Cartridge, 105mm, M32" for which said items the United States of America, as aforesaid, promised and agreed to pay unto the plaintiff herein the sum of \$69,339.20 based upon a charge [3] of \$0.151 for each of said 459,200 liners. That said contract was and is designated by the United States of America as Contract No. DA-04-495-ORD-278.

V.

That by the terms and provisions of said written contract, it was further provided and agreed that variations in the quantity of said items to be delivered to the extent of two percent (2%) more or less than the number of said items provided to be manufactured, to wit, 459,200, would be allowable by and acceptable to the United States of America, provided such variation was caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes.

VI.

That it was further provided and agreed in said written contract that by virtue of the permitted variation in quantity as aforesaid, to wit, two percent (2%), plaintiff was authorized to manufacture or have manufactured, and thereupon deliver to the United States of America as aforesaid, a maximum total of 468,384 each of said inner assembly liners.

VII.

That it was further provided and agreed in said written contract, that upon the manufacture and delivery of 468,384 of the aforesaid inner assembly liners, the United States of America would pay to plaintiff the total purchase price of \$70,725.98 at the times provided in said contract.

VIII.

That it was further provided and agreed in said written contract that the aforesaid inner assembly liners were required to [4] be manufactured of rayon cloth and in accordance with certain specifications designated as military specifications PA-PD-29 dated March 2, 1951, as amended by amendment 1 dated May 7, 1951. That said specifications provided that the said inner assembly liners were to be manufactured of rayon cartridge cloth, and further designated and described the required color, appearance, width, weight, breaking strength, allowable ether extract, allowable acidity or alkalinity, permissible ash content, air permeability and workmanship of and to be employed in the manufacture of said rayon cartridge cloth.

IX.

That prior to the aforesaid 14th day of March, 1952, to wit, on or about December 18, 1951, plaintiff and the United States of America, as aforesaid, first had conversations wherein plaintiff and the United States of America, as aforesaid, discussed the conditions, circumstances, terms and manner

under and in which plaintiff might undertake and agree to manufacture and deliver to the United States of America, the aforesaid ordnance items. That said conversations, together with certain negotiations in writing, were continued and carried on by and between plaintiff and the United States of America, as aforesaid, until and including said 14th day of March, 1952, on which date the aforesaid written contract was made, executed and delivered.

X.

That prior to the aforesaid 14th day of March, 1952, to wit, sometime during the month of January 1952, plaintiff and the defendant Deering-Milliken & Co., Inc. had conversations wherein the plaintiff and the said defendant discussed the conditions, circumstances, terms and manner under and in which the said defendant might undertake and agree to manufacture or have manufactured and [5] delivered to the plaintiff the said rayon cartridge cloth to be used by said plaintiff in the manufacture of the aforesaid ordnance items under and pursuant to the aforesaid contract of March 14, 1952. That said conversations, together with certain negotiations in writing were continued and carried on by and between the plaintiff and said defendant until on or about the 6th day of March, 1952, on or about which said date a contract was made, executed and delivered upon the terms and conditions hereinafter set forth.

XI.

That on the occasion of the first conversation

with defendant and at all times thereafter during the course of additional and further conversations, and in said negotiations in writing, to and including on or about the 6th day of March, 1952, the plaintiff stated to the defendants, and each of them, both in writing and orally, that the said rayon cartridge cloth was being purchased by the plaintiff for use in the manufacture of the said inner assembly liners; that said inner assembly liners were to be furnished to the United States of America by the plaintiff under and pursuant to the terms and provisions of a written contract to be made, executed and delivered by and between the plaintiff and the United States of America; and that said defendants, and each of them, would, therefore, be required to manufacture said rayon cartridge cloth in accordance with the aforesaid military specifications PA-PD-29 as amended. That a written copy of the military specifications PA - PD - 29, as amended, had been delivered to the defendant Deering-Milliken & Co., Inc., some time prior to the month of January, 1952 as aforesaid, and that at all times herein mentioned, said defendants had knowledge of and were fully aware of said specifications.

XII.

That thereafter, to wit, on or about the 6th day of March, [6] 1952, and following certain oral and written negotiations as aforesaid, had by and between plaintiff and defendant Deering-Milliken & Co., Inc., the said defendant acknowledged, advised and informed plaintiff in writing, that by virtue of

said writing, a contract had been made and executed by and between the plaintiff and said defendant pursuant to the terms and provisions of which the said defendant agreed to manufacture and deliver to the plaintiff, 126,000 yards of rayon cartridge cloth to be manufactured pursuant to the aforesaid military specifications PA-PD-29 as amended, for the purchase price of 36 $\frac{1}{8}$ c per yard or a total purchase price of \$45,517.50.

That by the terms and provisions of said writing of March 6, 1952, it was provided and agreed by and between plaintiff and said defendant that delivery of said rayon cartridge cloth was to start in April, 1952 and that said delivery was to be "spread out to completion".

XIII.

That by the terms and provisions of said writing dated March 6, 1952, it was provided and agreed by and between the plaintiff and defendant Deering-Milliken & Co. Inc. that said contract as aforesaid was subject to the receipt by the plaintiff of a contract from the United States of America and further that said contract was predicated upon the ability of the defendant Deering-Milliken Co. Inc. to "handle the business" when the plaintiff was in a position to confirm the fact that a contract had been received from the United States of America.

XIV.

That thereupon, to wit, on the said 14th day of March, 1952, and in sole reliance upon the defendant's promise and agreement contained in the afore-

said writing of March 6, 1952, the aforesaid [7] contract of March 14, 1952 by and between the plaintiff and the United States of America as aforesaid, and which said contract is more specifically described hereinabove, was made, executed and delivered.

XV.

That immediately following the execution of said contract of March 14, 1952 by and between the plaintiff and the United States of America as aforesaid, the plaintiff orally advised the said defendant Deering-Milliken & Co. Inc. that the aforesaid written contract of March 14, 1952 by and between the plaintiff and the United States of America, as aforesaid, had been made, executed and delivered.

XVI.

That thereafter, to wit, under date of March 14, 1952, defendant Deering-Milliken & Co. Inc. made, executed and delivered an instrument in writing designated Memorandum of Order addressed to the plaintiff herein, which said Memorandum of Order provided as follows:

(a) That delivery of 1/6 of the aforesaid rayon cartridge cloth was to be made every two weeks, starting with the earliest possible date, but not later than April 18, 1952, delivery to be made from Charleston, South Carolina;

(b) That the price thereof was to be 36 $\frac{1}{8}$ c each per yard, payable on terms of net 30 days;

(c) That the plaintiff was to forthwith make an advance payment in an amount of money equal to

10% of the purchase price provided to be paid by the terms of the aforesaid writing dated March 6, 1952; and [8]

(d) That said rayon cartridge cloth was to be shipped in bales.

That there was further contained in said Memorandum of Order an acknowledgment by the said defendant in writing that the said rayon cartridge cloth was being taken for government use.

XVII.

That thereafter, to wit, on or about the 20th day of March, 1952, and in compliance with and pursuant to the terms and provisions of the aforesaid writing of March 6, 1952, and the aforesaid Memorandum of Order dated March 14, 1952, the plaintiff drew its check No. 1163 in the amount of \$4551.75 payable to the order of Deering-Milliken & Co. Inc., the defendant herein, and did thereupon on said 20th day of March, 1952 deliver said check to the defendant Deering-Milliken & Co. Inc.

That said check was tendered and delivered as the aforesaid advance payment on the said total purchase price provided to be paid by plaintiff to said defendant as aforesaid.

XVIII.

That thereafter, to wit, on or about the 25th day of March, 1952, the said defendant Deering-Milliken & Co. Inc. advised the plaintiff in writing that it, the said defendant, would not deliver the rayon cartridge cloth provided for in the aforesaid contract

of March 14, 1952, by and between the plaintiff and the United States of America, which said cloth the defendant had theretofore promised and agreed to deliver to the plaintiff for the purpose of enabling plaintiff to perform according to the terms and provisions of said contract of March 14, 1952.

XIX.

That thereafter, to wit, on or about the 27th day of [9] March, 1952, and thereafter on or about the 1st day of April, 1952, on or about the 7th day of April, 1952, on or about the 11th day of April, 1952, and on or about the 21st day of April, 1952, the plaintiff requested of the said defendant, in writing, to perform the contract heretofore made by and between the plaintiff and said defendant but said defendants, and each of them, thereafter failed and refused to deliver to the plaintiff said rayon cartridge cloth or any portion thereof and no delivery thereof, or any portion thereof, has been made by the defendants, or any of them, pursuant to the agreement between the plaintiff and defendant as aforesaid, or otherwise, or at all.

XX.

That at all times herein mentioned, the defendants, and each of them, knew, and the plaintiff had so informed said defendants, and each of them, that said rayon cartridge cloth was being purchased by the plaintiff so that plaintiff could in turn execute and perform the aforesaid contract of March 14,

1952 by and between the plaintiff and the United States of America as aforesaid.

XXI.

That the defendants, and each of them, knew or should have known that the terms and provisions of the aforesaid contract of March 14, 1952 would allow to the plaintiff a certain profit after payment by the plaintiff to the defendant of the aforesaid purchase price of \$45,517.50, and said profit so anticipated by the plaintiff was reasonably within the knowledge and the contemplation of the plaintiff and said defendant at all times during the period January, 1952, to and including the said 14th day of March, 1952.

XXII.

That plaintiff would have been required to expend, in [10] the manufacture of said inner assembly liners as required by the terms and provisions of said contract of March 14, 1952, including therein the cost of said rayon cartridge cloth, the total sum of \$57,608.60 for which said inner assembly liners, when delivered to the United States of America, the plaintiff would be paid the sum of \$70,725.98 as aforesaid.

XXIII.

That by reason of the breach of the said agreement by and between the plaintiff and defendant Deering-Milliken & Co. Inc. as aforesaid, the plaintiff has, therefore, been damaged in the sum of \$13,117.38.

XXIV.

That at all times herein mentioned, the defendants, and each of them, knew or should have known, that in the event of the failure, refusal or neglect of any by the said defendants, or any of them, to perform the aforesaid agreement by and between the plaintiff and the defendant Deering-Milliken & Co. Inc., the United States of America would, under and pursuant to statutes provided therefor terminate the aforesaid contract of March 14, 1952 by and between the plaintiff and the United States of America and would charge the said plaintiff as being accountable for any and all damages sustained by the United States of America by reason of the failure, refusal or neglect of the plaintiff to perform the aforesaid contract of March 14, 1952.

XXV.

That on or about the 2nd day of June, 1952, the United States of America did by and through its agents, employees and representatives, deliver to the plaintiff herein a written Notice of Termination for Default, relating to the aforesaid contract of [11] March 14, 1952.

XXVI.

That thereafter, to wit, on or about the 8th day of June, 1952, the United States of America, by and through its agents, employees and representatives in the Department of the Army demanded of the plaintiff in writing that the plaintiff pay unto the United States of America the sum of \$4100.66, said sum being the excess amount required to be

paid by the United States of America for the procurement of the inner assembly liners which the plaintiff promised and agreed to manufacture and deliver to the United States of America pursuant to the terms and provisions of the aforesaid contract of March 14, 1952.

XXVII.

That plaintiff is informed and believes, and basing this allegation upon such information and belief alleges that the United States of America, by and through its agencies created therefor, will, in due course, proceed against the plaintiff in the manner and form provided by law, to enforce payment of said sum of \$4100.66.

XXVIII.

That by reason of the breach by the said defendants, and each of them, of the said agreement between plaintiff and defendant Deering-Milliken & Co. Inc., plaintiff has been damaged in the further and additional sum of \$4100.66.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

(a) For damages in the sum of \$17,118.04 plus interest thereon at the rate permitted [12] by law from the 25th day of March, 1952;

(b) For plaintiff's costs of suit; and

(c) For such other and further relief, as the Court may deem meet and proper.

AARON L. LINCOFF and
GILBERT KLEIN,

/s/ By AARON L. LINCOFF,

Attorneys for Plaintiff [13]

Duly Verified. [14]

[Endorsed]: Filed August 19, 1952.

[Title of District Court and Cause.]

ANSWER

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, answers plaintiff's complaint on file herein as follows:

I.

Answering paragraphs II, IV, V, VI, VII, VIII, IX, XIV, XVII, XXII, XXV, XXVI and XXVII thereof, answering defendant has no information or belief sufficient to enable it to answer any of the allegations contained in said paragraphs, and therefore, and placing its denial upon such ground, denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

II.

Answering paragraphs III, X, XI, XII, XIII, XV, XVI, [15] XVII, XIX, XX, XXI and

XXIV thereof, answering defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

III.

Answering paragraphs XXIII and XXVIII thereof, answering defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them, and particularly denies that plaintiff has been damaged in the sum of Thirteen Thousand One Hundred Seventeen Dollars and Thirty Eight Cents (\$13,117.38) or in the sum of Four Thousand One Hundred Dollars and Sixty Six Cents (\$4,100.66) or in any other sum or amount whatsoever.

Wherefore, answering defendant prays judgment as follows:

1. That plaintiff take nothing by reason of its complaint on file herein;
2. For answering defendant's costs of suit incurred herein; and
3. For such other and further relief as to the Court may seem proper.

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Answering Defendant
Deering-Milliken & Co., Inc. [16]

Duly Verified.

Affidavit of Service by Mail attached. [17]

[Endorsed]: Filed October 6, 1952.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, hereby amends its Answer to plaintiff's Complaint on file herein by adding after paragraph III on page two of said Answer and before the prayer for relief of said Answer the following allegations to its Answer on file herein:

For a Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That, although the alleged contract was for the sale of goods for the price of Five Hundred Dollars (\$500.00) or more, no note or memorandum thereof was ever made in writing, setting forth the essential terms thereof, and subscribed by defendant or [18] its authorized agent; nor did plaintiff accept or receive any part of the goods; nor did the plaintiff at the time pay any part of the purchase money.

For a Second Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That plaintiff did not take reasonable measures to minimize the amount of damages alleged in the Complaint on file herein, to wit: Profits allegedly lost from a contract with the United States, and a penalty allegedly owing by plaintiff to the United

States for having to breach said alleged contract.

II.

That reasonable measures to be taken by plaintiff pursuant to its duty to minimize damages included, amongst other things, the procuring from a supplier other than defendant the goods necessary to perform its alleged contract with the United States, or the purchase from defendant of the goods as offered and the subsequent processing of said goods by plaintiff at a relatively small additional cost.

For a Third Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That the alleged condition precedent to the formation of the alleged contract, to wit: Defendant's ability to "handle the business" after plaintiff's receipt of the alleged Government contract, has never occurred.

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Defendant, Deering-
Milliken & Co. Inc.

[19]

[Endorsed]: Lodged November 30, 1953.

[Endorsed]: Filed December 2, 1953.

Mr. Aaron L. Lincoff, April 13, 1954
608 So. Hill St., Los Angeles, Calif.

Mr. Lawrence T. Lydick,
523 W. Sixth St., Los Angeles, Calif.

Re: Modern-Aire of Hollywood, Inc., vs. Deering-Milliken & Co., Inc., et al. Case No. 14,428-T Civil.

Gentlemen:

Please be advised the Court has entered its order this date finding that judgment be entered in favor of the Plaintiff in the above-entitled matter, allowing \$4,421.60 as the amount for loss of profit to the plaintiff and allowing \$4,100.66 as the amount of indebtedness to the United States.

The latter amount (\$4,100.66) shall be set up in the Findings of Fact and Conclusions of Law and Judgment as a trust to be held for the benefit of the United States.

Counsel for plaintiff will please prepare and submit formal Findings of Fact, Conclusions of Law and Judgment pursuant to Local Rule 7.

Very truly yours,

EDMUND L. SMITH, Clerk
By WM. A. WHITE, Deputy Clerk

P.S.—The Court did not file a written decision in this matter. [20]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, files its objections to the proposed findings of fact, conclusions of law and judgment in the above-entitled cause received by it May 10, 1954, as follows:

I. Objections to Proposed Findings of Fact and Conclusions of Law:

A. Defendant objects to the preamble to said Findings of Fact, and particularly the language of page 1, line 32, thereof reading “* * * and the cause submitted for decision” * * * on the ground that said cause was never submitted for decision and that oral reply argument to plaintiff’s closing argument was never allowed to defendant despite approval of the Court and stipulation by plaintiff to such procedure in the within action.

B. Defendant objects to Findings of Fact I through XXIII, inclusive, on the grounds, among others, that said Findings are inconsistent among themselves and one as to the other, and [21] that said Findings, and each of them, are not supported by sufficient evidence, and that said Findings include findings of excessive damages which appear to have been given under the influence of passion or prejudice or as a result of error of law, and that said Findings include findings not properly within the issues of this case and outside the jurisdiction

of this Court, all as hereinafter more particularly set forth.

C. Defendant objects to Findings of Fact II and III on the ground, among others, that said Findings of Fact are not supported by sufficient evidence, the evidence being uncontradicted that at the time mentioned therein there had been no agreement as to subject matter, price, quantity, width, delivery, terms of credit and other terms essential to the creation of a contractual obligation nor any agreement by plaintiff to any of the terms of said alleged contract in writing.

D. Defendant objects to Finding of Fact IV on the ground, among others, that said Finding of Fact is not supported by sufficient evidence, the evidence being uncontradicted that the Memorandum of Order referred to therein was prepared at plaintiff's request for submission to defendant for acceptance or rejection by defendant, makes no reference to any prior agreement and does not confirm any of the language of the documents of March 6, 1952, but in fact on its face sets forth new terms and conditions for consideration by defendant and indicates on its face it is subject to acceptance or rejection by defendant.

E. Defendant objects to Findings of Fact V, VI and VII on the ground, among others, that said Findings are not supported by sufficient evidence, the weight of the evidence being that the estimated cost of manufacture by plaintiff of the items referred to therein was \$64,917.60, the total price which the United States of America promised

under certain circumstances to pay plaintiff therefor was \$69,339.20, and any profit to plaintiff thereunder [22] was by the terms of said contract between plaintiff and the United States of America subject to renegotiation under the laws of said United States of America and, therefore, completely remote and speculative.

F. Defendant objects to Findings of Fact VIII, IX, X and XI on the ground, among others, that said Findings are not supported by sufficient evidence.

G. Defendant objects to Findings of Fact XII and XIII on the ground, among others, that said Findings assume and are based upon findings of fact not supported by sufficient evidence.

H. Defendant objects to Finding of Fact XIV on the ground, among others, that said Finding is not relevant and not material to the issues of the within action.

I. Defendant objects to Finding of Fact XV on the ground, among others, that it is not supported by sufficient evidence.

J. Defendant objects to Findings of Fact XVI and XVII on the grounds, among others, that said Findings are not relevant nor material to any issue in the within action and are not supported by sufficient evidence.

K. Defendant objects to Findings of Fact XIX and XX on the ground, among others, that said Findings are not supported by sufficient evidence, the evidence being uncontradicted that said Lee Piersol had no authority to conclude negotiations

for contracts on behalf of defendant, such action being outside the scope of his authority.

L. Defendant objects to Findings of Fact XXI, XXII and XXIII on the ground, among others, that said Findings are not supported by sufficient evidence.

M. Defendant objects to Conclusions of Law I, II and III on the grounds, among others, that said Conclusions are contrary to law, are not supported by the Findings of Fact and include [23] matters outside the jurisdiction of this Court.

II. Objections to Proposed Judgment:

A. Defendant objects to the proposed Judgment on the grounds, among others, that said Judgment is contrary to law, is not supported by adequate findings of fact and conclusions of law, is outside the jurisdiction of this Court and includes award of damages which appear to have been given under the influence of passion or prejudice or as a result of error of law, and is a judgment made before final submission of the cause for decision. Defendant further objects to said proposed Judgment on the ground it does not conform to the decision of the Court as rendered April 13, 1954.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Defendant Deering-
Milliken & Co., Inc. [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Above Entitled Cause came on regularly for trial before the above entitled Court, before the Honorable Ernest A. Tolin, Judge presiding, and trial thereof having commenced on November 20, 1953, and having continued thereafter on November 23, 24, 25 and 30, 1953, and on December 1 and December 2, 1953, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by its attorneys, Gilbert Klein and Aaron L. Lincoff, Esqs., and defendant, Deering-Milliken & Co. Inc., a New York corporation, appearing by its attorneys, Adams, Duque and Hazeltine, by Henry Duque and Lawrence T. Lydiek, Esqs.; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, the [26] Court now makes its Findings of Fact as follows:

I.

The Court finds that the allegations contained in Paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIV, XV, XVII, XVIII, XIX, XX, XXI, XXIV, XXV and XXVII of plaintiff's Complaint are true.

II.

The Court finds that on or about the 6th day of March, 1952, in the County of Los Angeles, State

of California, a contract in writing was entered into by and between the plaintiff and defendant, under and pursuant to the terms and provisions of which the defendant agreed to manufacture and deliver to the plaintiff 126,000 yards of rayon cartridge cloth, to be manufactured pursuant to military specifications known and designated as PA-PD-29, as amended, and which specifications are in evidence as plaintiff's Exhibit 5.

III.

The Court finds that said contract in writing, made and executed as aforesaid on or about the 6th day of March, 1952, consists of two letters written by the defendant to the plaintiff, which said two letters are in evidence as plaintiff's Exhibits 6 and 7.

IV.

The Court finds that plaintiff's Exhibit 8 in evidence, designated Memorandum of Order, was prepared by the defendant in accordance with the defendant's business custom, practice and usage, and was prepared by the defendant for the purpose of confirming the fact that a contract had been entered into on or about March 6, 1952, by and between the plaintiff and defendant, and for the further purpose of confirming certain terms and conditions contained in the contract made on or about March 6, 1952. [27]

V.

The Court finds that the cost to the plaintiff of manufacturing the inner assembly liners, required

to be manufactured by the plaintiff in accordance with the terms and provisions of its contract with the United States of America, said contract being in evidence as plaintiff's Exhibit 12, was the sum of \$66,304.38.

VI.

The Court finds that the total price which the United States of America promised and agreed to pay to the plaintiff under and pursuant to the terms and provisions of the aforesaid plaintiff's Exhibit 12 in evidence was the sum of \$70,725.98.

VII

The Court finds that under and pursuant to the terms and provisions of the contract by and between the plaintiff and the United States of America, plaintiff's Exhibit 12 in evidence, the plaintiff was entitled to and would have realized a profit of \$4,421.60, and that accordingly the plaintiff has suffered and sustained damages in said amount of \$4,421.60.

VIII.

The Court finds that the plaintiff relied upon the promises, agreements and covenants contained in the aforesaid contract of on or about the 6th day of March, 1952, being plaintiff's Exhibits 6 and 7 in evidence, and that in reliance thereon, plaintiff made and executed the contract with the United States of America, being plaintiff's Exhibit 12 in evidence.

IX.

The Court finds that except for the promises,

agreements and covenants made by the defendant and contained in the contract of on or about March 6, 1952, being plaintiff's Exhibits 6 and 7 in evidence, plaintiff would not have entered into its contract with the United States of America, being the aforesaid plaintiff's Exhibit 12 in evidence. [28]

X.

The Court finds that plaintiff's Exhibits 6 and 7 were written by the defendant for the express and sole purposes of having the plaintiff rely thereon and as an assurance to the United States of America that a binding contract had been entered into on or about March 6, 1952, by and between the plaintiff and defendant, and that said contract was contained in and evidenced by said plaintiff's Exhibits 6 and 7 in evidence.

XI.

The Court finds that when said plaintiff's Exhibits 6 and 7 were written by the defendant, the defendant knew that said exhibits would be shown to the duly authorized representatives of the United States of America and that the United States of America would not have entered into a contract with the plaintiff, plaintiff's Exhibit 12, unless and until the United States of America received said Exhibits 6 and 7.

XII.

The Court finds that at all times during the negotiations by and between the plaintiff and defendant prior to the making of the contract or on

or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the defendant knew the nature, content and requirements of the military specifications (plaintiff's Exhibit 5 in evidence) pursuant to and in conformity with which the defendant would be required to manufacture the rayon cartridge cloth which it agreed to manufacture and deliver to plaintiff.

XIII.

The Court finds that at all times during the negotiations by and between the plaintiff and defendant prior to the making of the contract of on or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the defendant knew that the rayon cartridge cloth which it agreed to manufacture and deliver to the plaintiff would not meet certain military specifications, but said defendant [29] nevertheless failed and neglected to advise plaintiff thereof until long after the making of the contract of on or about March 6, 1952.

XIV.

The Court finds that at no time prior to on or about March 6, 1952, did the plaintiff know that said rayon cartridge cloth would not meet the said military specifications, plaintiff's Exhibit 5 in evidence.

XV.

The Court finds that in reliance upon the promises, agreements and covenants contained in plaintiff's Exhibits 6 and 7 in evidence, plaintiff was

caused to and did suffer damages in the sum of \$4,421.60.

XVI.

The Court finds that it is true that on or about the 8th day of June, 1952, the United States of America, by and through its agents, employees and representatives in the Department of the Army, demanded of the plaintiff in writing that the plaintiff pay unto the United States of America the sum of \$4100.66, the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon.

XVII.

The Court finds that it is true that except for the breach by the defendant of its contract with the plaintiff, being the contract of on or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the United States of America would not have made a claim against the plaintiff for payment by it to the United States of America of the sum of \$4100.66.

XVIII.

The Court finds that one Lee Piersol was the regional manager for the defendant, Deering-Milliken & Co. Inc., a New York corporation, the said Lee Piersol having his office in Los Angeles, California.

XIX.

The Court finds that the said Lee Piersol was an employee [30] of the defendant who had been given permission and authority to commence, conduct and

conclude negotiations on behalf of the defendant leading to and for the making of contracts on behalf of the defendant.

XX.

The Court finds that the defendant authorized its employee and regional manager, Lee Piersol, to conduct and conclude all negotiations leading to the contract of on or about March 6, 1952, being plaintiff's Exhibits 6 and 7, and that the said Lee Piersol signed said plaintiff's Exhibits 6 and 7 and made the aforesaid contract for and on behalf of the defendant; and in all of said negotiations and in the making of said contract, the said Lee Piersol acted within the scope of authority given to him by the said defendant.

XXI.

The Court finds that the allegations in Paragraph I of the Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

XXII.

The Court finds that the allegations in Paragraphs I and II of the Second Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

XXIII.

The Court finds that the allegations in Paragraph I of the Third Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds as follows:

I.

That the plaintiff, Modern-Aire of Hollywood, Inc., a California corporation, is entitled to a judgment against the [31] defendant, Deering-Milliken & Co. Inc., a New York corporation, for damages in the sum of \$8,522.26, with interest thereon at the rate of seven per cent (7%) per annum from the 25th day of March, 1952, together with its costs and disbursements incurred herein.

II.

That the sum of \$4,100.66, being the amount of the claim and demand made by the United States of America against the plaintiff, is a sum which, if due and owing, is payable by the defendant, and that said amount is a trust fund or trust monies to be held as such by the defendant for the use and benefit of the United States of America.

III.

That by reason of the acts and conduct of the defendant toward the plaintiff, the defendant is estopped to deny that it is liable to the plaintiff in damages in the sum of \$8,522.26.

Dated: May 14th, 1954.

/s/ ERNEST A. TOLIN,

Judge of the U. S. District Court

Disapproved as to form:

ADAMS, DUQUE & HAZELTINE,

/s/ By ROBERT W. DRISCOLL,

Attorneys for Defendant, Deering-Milliken & Co.,
Inc., a New York corporation. [32]

Affidavit of Service by Mail attached. [33]

[Endorsed]: Lodged May 10, 1954.

[Endorsed]: Filed May 17, 1954.

In the United States District Court for the South-
ern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO., INC., a New York
corporation, JOHN DOE ONE, JOHN DOE
TWO, RICHARD ROE CORPORATION
ONE and RICHARD ROE CORPORATION
TWO, Defendants.

JUDGMENT

The Above Entitled Cause came on regularly for trial before the above entitled Court, before the Honorable Ernest A. Tolin, Judge presiding, and trial thereof having commenced on November 20, 1953, and having continued thereafter on November 23, 24, 25 and 30, 1953, and on December 1 and

December 2, 1953, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by its attorneys, Gilbert Klein and Aaron L. Lincoff, Esqs., and defendant, Deering-Milliken & Co. Inc., a New York corporation, appearing by its attorneys, Adams, Duque and Hazeltine, by Henry Duque and Lawrence T. Lydick, Esqs.; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, and [34] the Court having filed herein its written Findings of Fact and Conclusions of Law, now, therefore:

It Is Ordered, Adjudged and Decreed that plaintiff, Modern-Aire of Hollywood, Inc., a California corporation, do have and recover of and from the defendant, Deering-Milliken & Co. Inc., a New York corporation, damages in the sum of \$8,522.26, with interest thereon at the rate of seven per cent (7%) per annum from the 25th day of March, 1952.

It Is Further Ordered, Adjudged and Decreed that from said amount the sum of \$4,100.66 be held by the plaintiff as trust monies for the use and benefit of the United States of America and immediately upon receipt by plaintiff be remitted to the United States.

It Is Further Ordered, Adjudged and Decreed That plaintiff Modern-Aire of Hollywood, Inc., a California corporation, do have and recover of and from the defendant, Deering-Milliken and Co., Inc., a New York corporation, its costs and disbursements incurred herein in the sum of \$324.98.

The Clerk is ordered to enter this Judgment.

/s/ ERNEST A. TOLIN,

Judge of the United States District
Court [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Judgment docketed and entered
May 18, 1954.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of May, 1954.

Dated: June 17, 1954.

ADAMS, DUQUE & HAZELTINE,

/s/ By JAMES S. CLINE,

Attorneys for Appellant Deering-Milliken & Co.
Inc., a New York corporation. [37]

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

The undersigned, Seaboard Surety Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact business in the State of California hereby acknowledges that it is bound to pay to Modern-Aire of Hollywood, Inc., a California corporation, plaintiff, the sum of Ten Thousand Dollars (\$10,000.00).

The condition of this bond is that, whereas Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, has appealed to the United States Court of Appeals for the Ninth Circuit by Notice of Appeal filed June 17, 1954, from the judgment of this Court entered May 18, 1954, if said defendant shall pay the amount of the final judgment herein if its appeal shall be dismissed or the judgment affirmed or modified, together with all costs, interest and [38] damages that may be awarded, then this bond is void, otherwise to be and remain in full force and effect, This bond shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 8 of the above entitled Court.

Dated: June 18, 1954.

[Seal] SEABOARD SURETY COMPANY,
/s/ By HOWARD SISKEL,
Attorney-in-Fact

The premium on this bond is \$150.00.

Examined and recommended for approval as provided in Rule 8.

ADAMS, DUQUE & HAZELTINE,
/s/ By JAMES S. CLINE,
Attorneys for Appellant Deering-
Milliken & Co., Inc.

I hereby approve the foregoing. Dated this 18th day of June, 1954.

/s/ ERNEST A. TOLIN, Judge [39]

Notary Public Certificate attached.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 42, inclusive, contain the original Complaint; Answer; Amendment to Answer; Copy of Letter dated April 13 from Clerk to Counsel; Objections to Findings of Fact, Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Supersedeas Bond; and Designation of Record on Appeal which, together with the original exhibits and

Reporter's Transcript of Proceedings on November 20, 23, 24, 25, 30, December 1 and 2, 1953, in seven volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12th day of July, A.D. 1954.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Title of District Court and Cause.]

MOTION FOR AND ORDER EXTENDING
TIME TO FILE RECORD AND DOCKET
CAUSE IN APPELLATE COURT

Appellant, Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, by its attorneys of record and pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, hereby moves the Court for an order extending the time to file the record on appeal and docket the cause in the appellate court to and including the 16th day of August, 1954, upon the ground that the Notice of Appeal was filed on June

17, 1954, that forty (40) days from that date have not yet elapsed, and that because of the following facts, additional time is necessary to properly prepare the record for the appellate court:

Lawrence T. Lydick, an attorney at law and a partner in the firm of attorneys of record for appellant, was, since the inception of the within action, in charge thereof and was the attorney who prepared the same for trial and appeared on behalf of appellant at said trial. Since June 13, 1954 Mr. Lydick has been absent from said firm, having entered the Hospital of the Good Samaritan on said date and undergone surgery on June 14, 1954. Mr. Lydick is presently confined at home under the care of Donald A. Charnock, M.D., and will not be able to return to work until on or about August 1, 1954, and will not be able to engage in any active work until approximately October 1, 1954.

Mr. Lydick is the only attorney in the firm of Adams, Duque & Hazeltine, attorneys of record for defendant-appellant, who is familiar with the facts and circumstances of the within action, and in order that he may properly supervise and direct the appeal of said action, it is necessary that the time within which to file the record and docket the above entitled cause in the appellate court be extended to and including August 16, 1954.

ADAMS, DUQUE & HAZELTINE,

/s/ By JAMES S. CLINE,

Attorneys for Defendant-Appellant

Upon motion of defendant-appellant, good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including August 16, 1954.

Dated: July 19, 1954.

/s/ ERNEST A. TOLIN, Judge

[Endorsed]: Filed July 19, 1954. Edmund L. Smith, Clerk.

In the United States District Court for the Southern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO. INC., a New York
corporation, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, November 20, 1953

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Aaron L. Lincoff, 3450 Wilshire Blvd., Suite 901, Los Angeles;

and Gilbert Klein, 608 So. Hill St., Room 707, Los Angeles. [1*]

Los Angeles, Friday, Nov. 20, 1953, 10:15 a.m.

The Court: Good morning, counsel. After telling you we would start at 9:45 the court convenes at 10:15.

Now, one of the occasions for that—I could have, of course, said I was busy with the clerk, but I didn't get in, however, until five minutes after 10:00 because we had a jury trial going on here and the jury was out last night and I happen to still be in a convalescent state from an illness of last spring and I have to spend so many hours in bed.

I have a note made apparently at the time this case was set, that it was a one day case. The clerk said something to me yesterday about counsel having mentioned that it would take two or three days.

Mr. Lydick: I think that may be true, your Honor.

The Court: Having acted on the assumption it was a one-day case we have a jury called for Tuesday. I just let you know that. I don't want to deprive you of any time you need. We will take whatever time it requires.

But in these cases the Government pays for the juries in federal court, and we pay them a little better than in the state court, so inasmuch as we have 30 on that panel already ordered to be here Tuesday, we will have to take enough time out from

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

your case Tuesday morning to impanel that jury and then we will order them to return to begin the actual trial [4] at whatever time we can tell by then we will be through with your problem.

Mr. Lydick: Excuse me, your Honor. Could you tell me what the court's prospective Monday schedule is?

The Court: Very indefinite. I will know at the close of the morning recess. We have a matter on in the afternoon that would reasonably be expected to take all day, that is, all afternoon.

Monday is generally reserved for law and motion, but counsel just called and explained that he is about midway through a trial and the judge of the department where he is trying it said, "You have to be here Monday." So they are trying to work that out. There are many attorneys involved and if they still cannot go ahead Monday afternoon we can hear your case.

As to Monday morning, I understand that there are going to be requests to continue most of the matters set for Monday morning, so we might be able to perhaps get a substantial trial day for you.

Now, we have taken the judicial five minutes on those subjects. Do you wish to start proceeding with the case?

Mr. Lincoff: Plaintiff is ready, your Honor.

Mr. Lydick: Defendant is ready, your Honor. I am Lawrence Lydick of the firm of Adams, Duque & Hazeltine.

I wish to make a joint appearance with Mr.

Henry Duque, [5] who intended to be here but is ill with a cold. He intends to be here Monday.

I would like to introduce to the court Harold V. Kennedy, counsel of Deering, Milliken & Co. in New York. Mr. Kennedy is a member of the Bar, of course.

The Court: Good morning, Mr. Kennedy.

Mr. Kennedy: Good morning. Thank you for allowing me to participate and sit at counsel table.

The Court: You may have anyone at the counsel table you feel will be helpful for the case. If you want to move Mr. Kennedy's special admission for this case, all right.

Mr. Lydick: I would like to move the special admission of Mr. Kennedy. I can vouch for his good moral character. I know of my personal knowledge he is a member of the New York State Bar.

The Court: For the purpose of this particular litigation, Mr. Kennedy, you are a member of the Bar with an invitation to you to make whatever comments, objections or motions which the nature of your employment here would indicate to you to be made.

Mr. Kennedy: Thank you very much, your Honor.

Mr. Lincoff: May it please the court, I am Aaron L. Lincoff, and the gentleman seated to my immediate right, in the dark blue suit, is Leonard J. Mills, the president of the plaintiff corporation. The gentleman seated at his right [6] is Gilbert Klein, Esquire, a member of the Bar of California and my associate in this case.

If your Honor please, this is a case in which the plaintiff seeks to recover damages for breach of contract. It is one arising out of these circumstances and facts:

It would appear that sometime prior to on or about December 18, 1951, the plaintiff corporation was approached by the Government with respect to the possibility of its being able to furnish to the Government items of ordnance materiel, which, with the court's permission and for the sake of brevity, we will hereinafter refer to as a liner, that is, a piece of cloth that is used in the manufacture of cartridge shells, whether they be 75 mm or 105 mm, or what, but is manufactured apparently, and insofar as it pertains to this case, appears to be manufactured from rayon cloth.

Negotiations seeking as their end result the consummation of the contract with the United States Government was thereupon commenced. In the course of attempting to ascertain the availability of the material for the manufacture of these liners, as well as the price and circumstances under which they would be obtainable, the evidence will show that Mr. Mills contacted several concerns whose principal business it is and was to furnish this type of cloth. One of them was the defendant in this action, Deering-Milliken & Co., Inc., a New York corporation. That they are such a corporation, [7] organized and doing business in California, is admitted in the pleadings.

It would further appear, your Honor, from time to time quotations were furnished by Deering-Milli-

ken to Mr. Leonard Mills. These were, with almost no exception, save perhaps one exception, furnished by Mr. Lee Piersol, who, in all the correspondence which he signed and submitted to us—by “us” I mean the plaintiff—signed as regional manager. He and he alone, except as I have indicated before, perhaps on one occasion, carried on all the negotiations with Mr. Mills.

It would appear then that the negotiations of a companion sort, that is, the negotiations with the United States Government Ordnance Department, on the one hand, and Deering-Milliken & Co., on the other, were carried on contemporaneously during the course of the negotiations with Deering-Milliken & Co., and from time to time various quotations, as the market indicated, were made, that is, for the price per yard of the goods. And from time to time, also, there was discussion of the various and different widths in which this cloth was to be furnished for subsequent fabrication into these liners.

It would appear, your Honor, that a price of $36\frac{1}{8}$ cents per yard was fixed for cloth of $45\frac{1}{2}$ -inch width. The total contract with the Deering-Milliken & Co., under our theory of the case, resulted in an agreement that [8] Deering-Milliken & Co. would sell to the plaintiff 126,000 yards of this rayon cloth of $45\frac{1}{2}$ -inch width at $36\frac{1}{8}$ cents per yard.

Originally there was a quotation based on two different widths of the same material, but the testimony will indicate, I am satisfied, that for purposes of facility and ease of complying with the Govern-

ment delivery schedule and other Government contractual requirements, it was eventually agreed upon that it would all be one width, and so it was.

The evidence will further show, if your Honor please, that on March 6th Mr. Mills came to Mr. Piersol, after having been to the Army Ordnance Department, and told Mr. Piersol that Modern-Aire of Hollywood, the plaintiff in this case, had a contract with the Government. "They want a letter from you, Deering-Milliken, confirming the fact I have a contract with you."

The evidence will show that on March 6th, on that occasion when Mr. Mills was in the defendant's office here in Los Angeles, a letter was written and signed by Mr. Lee Piersol as regional manager, the language of which starts out, "This will confirm the fact that we have today consummated a contract," and then it went on to describe the goods.

The evidence will further show that on that same day, and perhaps within a few minutes, another letter was written for the purpose of assuring Deering-Milliken it had a contract, [9] the first letter having been written as assurance to the Army Ordnance Department.

The evidence will further show that in Mr. Mills' presence, and prior to writing the letter that was intended to satisfy the Government request, a call was made by Mr. Piersol to the Army Ordnance Office and confirmation of the fact that such a letter was requested and desired by the Government was obtained.

The evidence will then show, your Honor, that

thereafter Deering-Milliken & Co. apparently undertook to begin the manufacture of this goods. The Government contract had required, if your Honor please, that this goods, this cloth be manufactured according to what are known as government specifications PA-PD-29. Those specifications indicate various and sundry things with respect to the standards, specific properties and/or qualities this cloth is required to have. It discusses ether extract, permeability, weave and various and sundry things, all of which I don't profess to have in my mind at the moment, but the specifications will indicate the various breakdowns of the various requirements.

The evidence will further show that every letter, March 6th letters, as well as all letters submitted prior thereto by Deering-Milliken said and quoted and confirmed the fact they were dealing for the manufacture and furnishing of goods according to Specification PA-PD-29.

It will further show, your Honor, and your Honor will [10] hear, I am satisfied, throughout this trial a term called "in the greige." The word "greige," I think, is properly spelled and correctly spelled g-r-e-i-g-e.

The quotations in the letter, with respect to the furnishing of the goods, were without exception in every case, "according to PA-PD-29, in the greige."

The deposition of Mr. Lee Piersol, the regional manager, elicited without qualification that "in the greige" means as the goods come off the loom. It appears then that a written contract confirming the

assurance given by the United States Army Ordnance Department to Mr. Mills, that a contract had been let an informal document was drawn and made effective as of March 14, 1952.

Pursuant to the request of the Deering-Milliken Co. in New York, Mr. Mills tendered and delivered over to Mr. Piersol, in the Los Angeles office, a check by way of a down payment, I believe four thousand five hundred fifty-seven dollars and some-odd cents. That check was accepted and it was delivered to New York. That took place apparently, and I think without question the evidence will show that occurred on or about March 20th.

On March 21st a TWX, known in full language as a teletype message, came from New York from Mr. Lovett, a gentleman who was here at the time of the taking of the deposition of Mr. Mills, addressed to the attention of Mr. Piersol, and [11] that teletype message read as follows:

“Re Modern-Aire Spec Calls For Minimum Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Specifications in Order to Correct This Would Require Too Long a Time And We Be Unable To Meet Delivery Do Everything Possible To have Customer Accept.”

A demand for performance was made by a representative of the United States Army Ordnance Department upon Deering-Milliken. That was made by a gentleman whom we will produce in this court.

It was made in the form of a telephone call to

one J. C. Harris, a gentleman who is the vice president of Deering-Milliken in New York.

The testimony will be that the Army Ordnance Department, through Mr. Drake, called Mr. Harris and asked Deering-Milliken what it proposed to do about it. And Mr. Harris said, "We don't propose to do anything. It will cost us 3 cents a yard to finish it, in order to have it comply with the specifications, and we aren't interested."

We made an attempt to find out thereafter—this the testimony will show—or, to obtain this goods elsewhere, and aside from the question of apparent inability to meet the delivery schedule which the Government had set forth in its [12] contract, it appeared that it would have cost us at least six or seven thousand dollars over our cost price accepted by the Government, in order to get this goods.

Our total profit was only going to be \$13,000.00. That raises the question of law which I am sure your Honor is immediately aware of, and at the appropriate time we will present our authorities on that.

Suffice to say, your Honor, after demand was made for performance and after Mr. Harris advised the gentleman whom we will produce here as to its reaction, we were then compelled to tell the Government we could not perform according to the contract.

The contract as awarded by the United States Government to Modern-Aire provided that he would be paid \$70,725.98. There is a 2 per cent plus or

minus variation the Government will accept to, that the contract price may vary within that limit.

And the evidence will further show that our cost would have been \$57,608.60. We therefore would have realized a profit of \$13,117.38.

The evidence will show, without mistake, your Honor, that at all times Mr. Piersol knew—he so acknowledges in his deposition—that this was goods that was called for, to be furnished according to the specifications PA-PD-29.

It will also show that at all times—and he so [13] acknowledge again in his deposition—that Mr. Mills told him, “It is urgent. I have a Government contract. I have delivery schedules to meet.”

And it will also appear that Mr. Piersol was aware of the fact that there was a profit to be made.

We have submitted to your Honor our trial memorandum, setting forth the matter of knowledge of a profit is sufficient as the basis for special damages in the form of profit, even though the exact amount may not be known.

The Court: It still is damages within the contemplation of the contracting parties.

Mr. Lincoff: Yes.

The Court: As I understand your theory.

Mr. Lincoff: That is right. It is because it is, as a matter of fact, brought home by way of knowledge or notice to the defendant.

The Court: Prior to the acceptance of the contractual obligation?

Mr. Lincoff: That is correct.

The Court: When I make these comments, counsel, I am not deciding the final question of law. I am merely undertaking to let counsel know that I either understand their theory or misunderstand it. So that I might be corrected if I am not following correctly the thought of counsel.

Mr. Lincoff: What is of equal importance, your Honor, [14] and then this, too, is set forth in our pleadings, an item of special damages, which is this result which flowed from the circumstances as I now relate them to your Honor.

The plaintiff was thereupon confronted with the realization it could not perform under the contract which it had executed with the Government. Demand upon it, by the plaintiff, was made for the performance of the contract. The inability to perform was acknowledged. So the United States Government apparently procured this material elsewhere, and apparently had to pay the sum of \$3,100.66 over and above the contract price that Mr. Mills had been awarded, in order to procure it.

A formal demand was made upon Modern-Aire for the payment of that sum of money. And I want to represent to this court, as an officer of the court, that the matter was then brought to my attention. And I set these facts before the General Accounting Office in Washington.

The Court: General Accounting Office of the Government?

Mr. Lincoff: Yes, of the United States Government. And I was advised by that office, in view of the fact that my letter recited there was litigation

pending in which we were seeking to recover this amount, that at that time the plaintiff would not be put upon a list called "Persons Indebted to the United States."

I bring that to the court's attention so that the court [15] will know the particular status of that at this time. And I don't suggest—because I would not have the power to read the Government's mind—that that means they will not take action. I am satisfied an inquiry will eventually be made as to the status of this claim and this lawsuit, and a demand will be made in accordance with the position the Government has heretofore taken.

The Court: The Government is not a party to this particular litigation.

Mr. Lincoff: That is correct. I brought that out in the pleadings by setting forth this item of damages. This I want to respectfully suggest to the court: If we had had \$4,100.66 to pay, we would have paid the liability and then claimed for it. I represent to this court that if this court finds in favor of the plaintiff, that we would desire that an order be made directing Deering-Milliken to pay the sum of \$4,100.66, not to us, but directly to the United States Government in satisfaction of the claim of Modern-Aire.

In other words, I don't want to leave, by subtlety, implication or otherwise, any thought we might be able to pick up an additional \$4,100.66 unjustly. If your Honor please, we want no part of that money. We feel it is not ours. We are satisfied under the

law clearly it belongs to the Government of the United States.

I respectfully submit that such an order may be made by [16] this court under the pleadings.

So with respect to the specific recovery to the plaintiff, your Honor, actually we are asking only for our loss of profit.

The Court: For your——

Mr. Lincoff: For our loss of profit on the contract. The sum of \$4,100.66, as I say, we are satisfied to have, if the court should find in favor of the plaintiff, to have the court direct the defendants that that sum be paid directly to the Government of the United States in satisfaction of its claim.

The position taken by the defendants first became apparent, your Honor, after the TWX or teletype of March 21, 1952, to which I have already referred. That position then resolved itself into saying that “in the greige” didn’t mean as it came off the loom, as the merchandise or cloth came off the loom. It meant as it came off the loom, true, but that it also required further finishing.

The Court: Is that going to call upon us to determine what is meant in the trade by that particular expression or term?

Mr. Lincoff: I think, your Honor, that you may want to know that. I don’t think that that testimony is going to be admissible, your Honor, because the contract is specific in that it says—and all the correspondence says—“PA-PD-29, in the greige.” [17]

The Court: Then don’t we know what is meant by that term?

Mr. Lincoff: That is true, sir.

The Court: What is going to determine the inadmissibility of evidence to explain it?

Mr. Lincoff: Only if your Honor finds that the pleadings, of which there are none on the part of the defendant, I submit, raise either these two questions: A, an ambiguity in documents. That is a specific defense, I am sure your Honor well knows, that must be raised by affirmative pleadings.

And B, the fact that there is a custom and practice in a trade with respect to the interpretation of that phrase. And nothing of that sort appears in the pleadings, your Honor.

We submit, therefore, if your Honor please, that the contract as made is for "in the greige," according to Specifications PA-PD-29.

There is no pleading now, your Honor, as I say, in the defendant's Answer setting forth that there is any ambiguity about that term. And there is testimony which I am sure will be elicited, because it is in the deposition, that at no time did Mr. Piersol ever say anything at all about further finishing to Mr. Mills. And the defendant's position now is that "in the greige" means further finishing, that that is understood in the trade, they say, and everyone who is in the cloth business knows that.

This is something that perhaps I should hold for later, but I believe, and I feel properly compelled to bring it to your Honor's attention, and that is sometime in April some documents were sent out from the Deering-Milliken office in New York for Mr. Mills' signature, something called a sales note,

and there is specified "PA-PD-29, in the greige," and then they have suddenly on that added the words "when finished." That is the first time that we ever saw the phrase "when finished" added to "in the greige."

I respectfully submit this to your Honor for consideration: If in the trade the phrase "in the greige" means when finished, what was the necessity of putting it in the document? I think the case is clear in this respect, and this is the position which the plaintiff takes and will stand on: They simply couldn't meet the specifications, and they acknowledged it in their TWX. And if they didn't think they had a contract with us with respect to that, why they find themselves compelled in their TWX to say, "Do everything possible to have the customer accept"?

Those, I think, are the facts, your Honor. I think in all sincerity and honesty I have fairly stated the position of the plaintiff and the defendant. As the testimony unfolds I am satisfied, if your Honor please, it will bear out what I have stated to your Honor from this platform. We respectfully submit, therefore, your Honor, that judgment should be awarded [19] in favor of the plaintiff, against the defendant, for the sum of \$13,117.38 as and for loss of profits on the contract, and that a judgment should be rendered either ordering the defendant to pay the sum of \$4,100.66 directly to the Government of the United States, in satisfaction of its claim against Deering-Milliken, or if that money be paid to the plaintiff, it be paid to the plaintiff

only on condition in some way he satisfy this court it is immediately being made payable over to the Government of the United States.

The Court: You are actually asking then you be declared a trustee for the Government if that money be awarded to you?

Mr. Lincoff: If the mechanics are so required. I think the simplest thing and it is my suggestion it would be an order against the defendant.

The Court: Do your pleadings justify relief in that form?

Mr. Lincoff: I submit they do, your Honor. Thank you very much.

The Court: Does the defense wish to make a statement now or reserve it?

Mr. Lincoff: I will be happy to make a statement now, your Honor.

The Court: Thank you.

Mr. Lincoff: If your Honor please, I do not intend in this or any other opening statement I may make to any court to attempt to draw a legal or factual conclusion from the evidence. [20] In a jury case perhaps, but in a court trial I do not, because I feel this court will, from the evidence, be able to determine, for example, whether or not the March 6th instruments referred to were intended to be contracts, whether or not the amount of money paid to our company was intended to be a down payment or simply a deposit to insure that these people had money enough to go forward with an agreement if they entered into it. And what the purpose and meaning of the teletype will be. Mr. Lovett will be

in court, from New York, to testify as to the circumstances that led to the sending of that teletype.

I am going to limit myself, therefore, to a discussion of the elementary law principles which we think are applicable to this matter and to some of the background material which will be elicited from the evidence, but because of its special nature perhaps the court would like a review before trial.

The primary issue presented to the court in this action is a combined legal and factual issue of whether or not Deering-Milliken Co. Inc. and Modern-Aire of California, Inc. at any time ever entered into a binding contract for the sale by Deering-Milliken and the purchase by Modern-Aire of 126,000 yards of rayon cloth to be manufactured especially for Modern-Aire by Deering-Milliken.

The plaintiff contends that such a contract existed and was breached. Apparently, the contract is one of March 6, 1952. [21] The defendant contends that such a contract never existed and therefore could not have been breached.

The Court: Are you relying upon a lack of what we used to be told in law school was a meeting of the minds?

Mr. Lydick: Precisely, your Honor. Defendant Deering-Milliken Co. Inc. is a New York corporation with its main offices in New York City and branch sales offices throughout the United States.

For some eighty-eight years it has represented various cotton, woolen and rayon mills located in the Carolinas and in New England as an exclusive sales agent throughout the country. It owns and

operates no mills itself and manufactures no cloth itself.

As a sales agency its methods of operation are fixed and widely known in the trade. Local sales offices, such as that maintained in Los Angeles, have no authority to enter into any agreements and are merely transmitters of information, requests for quotations and orders to the New York office where these requests for quotations are, in turn, referred to the mills where orders, in turn, are referred to the mills and only after——

The Court: Are we going to have to determine an agency question here?

Mr. Lydick: I think if the question is whether or not Mr. Piersol had authority to enter into a contract, either by [22] oral statements or by any writings, very definitely I consider there is an agency question.

Mill quotations are referred through the New York office to local sales offices for transmittal to the prospective purchaser. Quotations, as distinguished from orders, acceptances of orders, are made directly from the New York office to the purchaser and do not go through a local sales office.

Local sales representatives have no authority, either actual or ostensible, to accept any order except for transmittal to New York. The New York office itself has no authority to accept any orders except after approval first obtained from the mill which has agreed to produce the cloth.

To anyone familiar with the textile industry these procedures are obviously necessary, for a given mill

only has so many looms and the scheduling and availability of time of these looms is a very necessary element to the entry into any contract and may be the key to whether or not a mill will accept or reject an order.

Rayon, the subject cloth in this lawsuit, is named as a generic term for manufactured textile fiber or yarn produced chemically from cellulose. After the manufacture of the yarn it must be loomed into cloth.

In order to prevent breakage of the yarn during the looming process there must be placed upon the yarn certain chemicals called weighting material, which strengthens it [23] during the looming process.

The commonly accepted trade term to describe rayon fabric as it comes from the loom, unbleached and unwashed, and containing this weighting material, is greige. The spelling may be either g-r-e-i-g-e or g-r-a-y, interchangeable. This term in the textile industry has no color connotation except as referred to as the undyed yarn in making cloth.

After the rayon goods have been loomed they must be converted or finished for ultimate sale. Bleaching, scouring to remove the weighting material, sizing, dyeing and printing, if that is the use to which it can be put, is all part of the converting and finishing process.

Mills which loom rayon cloth may have one or two types of facilities. They may have facilities which permit them to convert or finish the cloth, or

they may have no such facilities and be merely producers of greige goods.

Some rayon mills not only loom the greige goods, but they convert it and finish it and sell it directly or indirectly to the ultimate manufacturer. Other rayon mills produce only the greige goods and they sell those greige goods either to independent converters or to the ultimate user for the converter. These are to common knowledge in the textile industry. No such knowledge is more common than the fact that Deering-Milliken rayon mills are greige goods mills in the production of every type of material except those used in the garment [24] industry.

There is some debate in the industry itself as to whether or not it is wiser to produce at Burlington or J. P. Stevens or at some of the other mills that do finish goods. Those mills that produce finished goods cite the fact of the extra profit they gain by selling a finished product.

Deering-Milliken, however, cites the advantage in producing only greige goods and not having to guess as to color and style that Miss or Mrs. America or the trade may desire in a particular year, and perhaps in missing the guess of large inventories not readily salable.

Plaintiff Modern-Aire of Hollywood is a California corporation whose assets consist of some leased space slightly larger than this courtroom, a number of sewing machines, a few cutting tables and some other miscellaneous equipment. This prop-

erty was purchased by Leonard Mills and two associates in May of 1951.

Sometime in 1951 Mr. Mills obtained entire control and became president and treasurer of the company, his wife being secretary. Insofar as production of any sort is concerned, the corporation has been completely inactive at all times since Leonard Mills has had any connection with it.

Leonard Mills will testify, if in accord with his deposition, that before the Second World War he was employed in the jewelry business and in the retail furniture business. Since [25] coming out of the Service in 1946 his primary employment has been the war surplus business under the name of L. J. Mills & Company for a short period.

In late 1951 and sometime in the summer of 1952 Mr. Mills sought to obtain a number of contracts from various branches of the Armed Services to produce various and different textile items. Other than the manufacture of a few sample parachutes for parachute flares and an attempt to obtain a government contract for these flares, which never materialized, Mr. Mills has apparently never had any direct or indirect experience in the manufacturing of textile products or any acquaintance with the textile industry. Therein lies perhaps the source of the whole conflict to be presented to this court, for in the textile industry, as in all things, a little knowledge is often worse than none at all.

With this background of the parties and industry they operate or sought to operate, we turn again to the issue presented in the case of Deering-Milli-

ken & Co. and Modern-Aire of Hollywood, that at any time they entered into a binding contract of the sale and purchase of 126,000 yards of rayon cloth.

The evidence, we believe, will show that sometime shortly before Christmas 1951 Leonard Mills asked that that office obtain a quotation for him on nearly half a million yards of natural and unbleached rayon cloth in varying widths which he thought he might require in connection with a government [26] contract he was seeking. He was at that time concerned particularly with the weight of the cloth and indicated he would probably need delivery sometime during March through August.

He informed the local sales office of Deering-Milliken that the cloth he sought a quotation on was described in the specification PA-PD-29 of March 2, 1951. He was advised of Deering-Milliken procedures and his request for a quotation was transmitted to New York by Mr. Piersol of the Los Angeles sales organization.

Upon receipt of the inquiry in New York, it was assigned to Charles Lovett for handling. He, in turn, referred it to Deering-Milliken's fabric development department to contact the mill that manufactured the cloth sought by Mr. Mills.

From fabric development it was determined that Drayton mills in the Carolinas could manufacture greige goods which, when finished, would meet Specification PA-PD-29. Inquiry was made of this mill and in due course the mill advised it would be interested in such an order and authorized a quota-

tion of 34 cents per yard in the greige on the 38-inch width which Mr. Mills has requested.

This quotation was transmitted by New York to Los Angeles January 9, 1952, nearly 12 to 14 days later and was, in turn, relayed to Mr. Mills.

It is now apparent from this beginning there was a complete misunderstanding as to the subject matter of the [27] negotiations that were to follow. Mr. Mills claims he sought quotations only on goods which would, when delivered, meet every detail of Specification PA-PD-29. Deering-Milliken's office in New York rightfully presumed that he, holding himself out as a prospective purchaser of nearly a half a million yards of fabric, knew his specifications sufficiently to know they called for finished goods, and knew the language of his trade sufficiently well to know that goods stated "in the greige" would have to be finished before they could meet that specification, and knew his industry well enough to know that Deering-Milliken only produced and sold greige goods that always had to be finished by the buyer before it could be put to use.

With this inherent misunderstanding practically assuring an ultimate failure to all discussions because of lack of mutual assent, Mr. Mills continued spasmodically, through January, February and early March of 1952, to seek new quotations for new widths, new lengths, new delivery schedules. All quotations given by Deering-Milliken to Mr. Mills were intended to and nearly every case did refer to greige goods which, when finished, would meet Specification PA-PD-29 insofar as the intent

of the quoter was concerned, and all quotations were apparently misunderstood by Mr. Mills to mean that Deering-Milliken could produce greige goods and was quoting on greige goods that would meet specification PA-PD-29 without further finishing, [28] although the specification itself obviously indicated that finished goods were referred to.

During the same time Mr. Mills apparently was pursuing his negotiations with the Ordnance Department officials, to obtain this and other contract from them. One thing, we believe, will seem clear from the evidence. Mr. Mills was definitely giving no one a firm order for 500,000 yards or 100,000 yards or 10 yards of rayon greige goods or finished goods, until he had a signed contract with the Department of the Army.

On March 14, 1952, we believe the evidence will show that Mr. Mills obtained his contract with the Government, and in turn, for the first time, placed a firm order with Deering-Milliken. It was during the processing of this order, for the purpose of determining whether or not it would be accepted or rejected, the processing being both by the New York office of Deering-Milliken and by Mr. Mills, that certain correspondence regarding minimum widths and certain correspondence regarding samples, and the very language of the order itself brought to the attention of the New York office that Mr. Mills had been misinterpreting the quotations they had been making.

On Friday, March 21, 1952, Mr. Piersol, both by telephone and by teletype, called and subsequently

was advised to determine and clarify whether or not such a misunderstanding, which they believed from these matters that had come to their attention in New York, existed; whether or not it did truly exist. [29]

Plaintiff, who apparently was given the teletype itself by Mr. Piersol the day it was received, apparently felt it to be highly important evidence. Mr. Lovett will testify as to the circumstances under which it was written, as to its intended purpose.

One of the principal difficulties which defendant has encountered is to determine what plaintiff's claim is as to when plaintiff's requests for quotations and defendant's response to these requests are supposed to have resulted in an unequivocal order and unequivocal acceptance that is necessary to form a contract.

In its pleading, Paragraph IX, plaintiff contends that, "On March 6, 1952, a contract was made, executed and delivered on the terms and conditions hereinafter set forth."

The alleged terms and conditions of this alleged written contract are set forth in Paragraph XII. Defendant unequivocally denies any intent to contract with Mr. Mills on that or any other date and, further, unequivocally denies the existence of any such instrument as is set forth in those pleadings.

The first firm order of any kind or nature from Mr. Mills to Deering-Milliken mill was transmitted on March 14, 1952, after Mr. Mills had obtained his contract from the Government. This order was never accepted, because, as previously explained,

during the course of the processing of that order Deering-Milliken discovered the complete lack of mutual assent as to [30] what the subject matter of the contract was.

The evidence will also show that during the entire period, March 14th to March 21st, there were extended conversations with Mr. Mills with respect to very essential terms upon which there had to be a meeting of the minds before there could have been any acceptance of that March 14th order.

The extended conversations regarding credit and delivery schedules and packaging and disposition of seconds, as well as terminating conversations concerning the subject matter. In order to have a binding agreement between two parties they must agree upon the same thing in the same sense and there must have been an exchange of offer for an acceptance and the agreement must have been definite and certain. It is plain and apparent these elementary contract principles had not been complied with in this. There being no agreement, there could be no breach by Mr. Mills or by Deering-Milliken.

Aside from the law in these facts, there is little equity in Mr. Mills' claims. His hope of quick profit without great effort in a field he knew nothing about by training and education and experience were, not unexpectedly, not realized. His desire to be indemnified for alleged loss of profits and alleged contingent liability for his breach of contract with the Government overlooks the fact, by taking the goods in the greige from either Deering-Milliken or other sources, they were available, and converting

them at any agreed price for [31] approximately 3 cents a yard or \$3,800.00, he still could have met his government contract and realized by his own figures nearly \$10,000.00 on that \$69,000.00 contract, and avoided all liability, contingent or otherwise, for breach of that contract.

The Court: I gather from your remarks that you contend this controversy involves only legal principles as distinguished from equitable?

Mr. Lydick: In my opinion, yes, your Honor. I find nothing in the pleading that would lead me to believe there is any equitable principle involved.

The Court: No estoppel?

Mr. Lydick: I find them unpleaded. If they are there, fine. I find them unpleased insofar as I find the necessary elements of those estoppels. If they are intended we have denied their existence.

The Court: Simply the question I put: This is nothing except kind of a preview of the feature that is now to be presented?

Mr. Lydick: As we understand it from the pleading and presentation of counsel, this action is based upon a written agreement of March 6, 1952. If we are mistaken with respect to that, why, we would be happy to have it clarified both in the pleading and here orally.

If there is anything else, we wish to amend our Answer to raise the statute of fraud by affirmative defense, raise the [32] mitigation of damages by affirmative defense and other matters which we did not feel essential where a written contract was alleged.

The Court: We started about 20 minutes after 10:00. If you wish a recess, if any party wishes a recess, we will take one. Otherwise, we might make up for our tardy beginning by going right on through until 12:00.

Mr. Lydick: That is agreeable.

Mr. Lincoff: Yes. Very cursory, your Honor, and by way of just a brief rebuttal——

The Court: We are not arguing now.

Mr. Lincoff: No. This is the last scene of the preview, if your Honor please. I think the old concept of meeting of the minds has been somewhat replaced by the concept of objective manifestation, rather than a meeting of the minds.

I think Judge Williston and all the legal writers on the law of contracts now make it clear that the question of the manifestation, intention, rather than a meeting of the minds, is the subject of contracts.

The Court: You mean that a meeting of the minds means something different than it used to way back in common law days?

Mr. Lincoff: In effect, yes, your Honor. Rather than what I understood, it is a question of whether I projected the essentials of a contract to someone, and who in [33] turn understood and said, "Yes, I will accept them."

The Court: Basically, it comes back to the same thing, though, doesn't it?

Mr. Lincoff: I think so, your Honor, except it is now a question of manifesting that intent by some objective conduct or agreement. With that,

your Honor, I would like to call as my first witness Mr. Leonard Mills.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Leonard J. Mills; M-i-l-l-s.

Direct Examination

Q. (By Mr. Lincoff): Where do you live, Mr. Mills?

A. At 9333 Monte Mar Drive, Los Angeles.

Q. For how long a period of time have you lived in Los Angeles County?

A. Since 1945.

The Court: May I just interrupt for a moment?

Mr. Lincoff: Yes, your Honor.

The Court: Some of these cases are tried here with no intention of ever briefing. Counsel want to rely upon arguments and upon whatever notes the court takes.

Other counsel are going to want to brief their cases, or [34] I find a lot of them do, and they intend, when they brief them, to submit a copy of the transcript as well, so the court can pick up its details from there. It makes no difference to me. I will either keep notes as we go along and you can still brief it, if you want to, but if you intend to provide transcript in the course of the submitted period, if you let me know now I will simply not

(Testimony of Leonard J. Mills.)

be taking notes I would take if I were going to rely entirely upon memory.

Mr. Lydick: Do you have any preference at all, Mr. Lincoff?

Mr. Lincoff: I have none. I will be happy—

Mr. Lydick: My purpose would be to have some briefing and submit it upon a shared-in cost transcript.

Mr. Lincoff: Your Honor, may I inquire of my client as to the suggestion which Mr. Lydick just made, that is,—

The Court: Suppose we take a few minutes for conference. I have had much experience here with counsel deciding they would split the cost of transcript, and other counsel would rather rely upon what the court keeps as its own notes. Others would like to pay out for the transcript, but haven't any assurance if they win the litigation it will be taxable as costs.

The court wants to be agreeable to the desires of counsel, so you might take a few minutes to explore it. We will recess for that purpose.

(Short recess taken.) [35]

Mr. Lincoff: If your Honor please, it has been stipulated that a transcript may be prepared, and the cost thereof to be borne equally by the plaintiff and defendant and to be taxed as an item of cost.

The Court: Thank you. Then I will not do as much writing. I will attempt to do as much listening.

For your information, our Monday calendar has been pretty well taken care of. If you want to count

(Testimony of Leonard J. Mills.)

on trial Monday, you can have it. You will have to bear with the fact there will be one or two brief law and motion matters. By and large, you can count on Monday.

Mr. Lincoff: Any hour other than the normal starting hour would your Honor suggest?

The Court: I think we might start at the regular starting hour. You might have to wait a few minutes. There is even a doubt as to that.

Q. (By Mr. Lincoff): I believe my last question was, Mr. Mills, how long have you lived in California. A. Since 1945.

Q. How old are you, Mr. Mills?

A. 40 years.

Q. You live with your wife and family at the residence you have given? A. I do.

Q. What was the extent of your formal education, sir? [36]

A. Three years at the university.

Q. Which university?

A. New York University.

Q. When did you complete that phase of your formal education? A. 1937.

Q. How old are you, sir? A. 40 years old.

Q. Did you engage in any type of business activity subsequent to your having completed your formal education at New York University?

A. I was active with my father in the millinery business in New York City, both manufacturing and retail, while going to school. And then upon his death I was active in the retail millinery busi-

(Testimony of Leonard J. Mills.)

ness that he left, until I came out to the West Coast.

Q. When did you come to the West Coast?

A. In approximately 1940.

Q. Where on the West Coast did you settle at that time? A. Portland, Oregon.

Q. Did you engage in any manner of business activity in Portland?

A. I did. First I was employed by Myron Frank there, and after Myron Frank I was with Westfield's Jewelry Store in Portland, Oregon. [37]

Q. For how long a period of time?

A. For a little over a year, somewhere between a year and a half and two years.

Q. Then what transpired with respect to your business career?

A. Nothing further in the business career at that time. In February of 1942 I enlisted in the Air Forces of the United States Army.

Q. How long did you serve in the United States Army Air Forces?

A. I was in the Service until May of 1946.

Q. After your separation from the service did you engage in any business activity?

A. I organized and operated a company, L. J. Mills & Company—my own company—in buying government surplus commodities, and operated that business until 1949, 1950. I have bought and sold approximately a million dollars' worth of government commodities.

Q. Now, did you at the time you were conduct-

(Testimony of Leonard J. Mills.)

ing L. J. Mills & Company engage in any additional business activities?

A. Oh, there were ventures in purchasing other goods, commodities from concerns outside of the United States Government, Westinghouse Aerosol bombs; other close-out merchandise of various nature.

Q. Subsequent to L. J. Mills & Company, did you engage in any type of business activity? [38]

A. In 1950 or the early part of 1951, somewhere in that period there, I bought an interest in Aircraft Tapered Sheets, which company was actively engaged and still is actively engaged in the fabrication of aircraft parts for the aircraft industry here in Los Angeles. It was Government work of a subcontract nature to the aircraft industry.

Q. For how long a period of time were you engaged and connected with Aircraft Tapered Sheets?

A. I was in that field until I learned at Wright Field that there was a local concern, Modern-Aire of Hollywood, that had secured a contract for the manufacture of parachutes. But that the party owning the company wasn't financially able to carry on with that contract.

Because of that, myself and two other parties, both of whom were interested in Aircraft Tapered Sheets, and Bardwell-McAllister, both contractors for the Government in defense work, bought the company.

It was a shell of a company. It had the physical assets, the plant and sewing machines and such. It

(Testimony of Leonard J. Mills.)

had a financial tax loss carry-forward we planned to take advantage of, and we purchased that company and started to negotiate for a parachute contract with Wright Field.

Q. Did you obtain that parachute contract?

A. No. There were several problems came up.

There were cutbacks in the procurement of parachutes [39] at that time, and we were unable to secure the parachute contract at that moment.

Q. Excuse me. I am sorry.

A. I am through.

Q. What was the continuing nature of your business activity?

A. At approximately that time the Ordnance Office of Pasadena contacted us. They had gotten our name, I believe, through Wright Field as a source for the manufacture of liners for 105 mm and 75 mm shells.

They surveyed the plant and found the facilities were satisfactory, and asked whether I would be interested in manufacturing those liners. I was.

Q. What did you then do with respect to pursuing that inquiry that the Government had made of you?

A. I received a proposal from the Pasadena office of the Ordnance Department to manufacture a quantity of 75 mm shells and 105 mm shells, that is, the liners for those shells.

I made inquiry from several sources for prices on the fabric, which was the major cost in the item. The liners consisted of this rayon fabric as per

(Testimony of Leonard J. Mills.)

Specification PA-PD-29, and threads; that is, the basic material that would be used.

Then labor to be added to it was the only other factor in it.

Q. Did you at any time in the course of obtaining this [40] information have occasion to contact Deering-Milliken, the defendant in this action?

A. Yes, I did.

Q. Approximately when did you first contact Deering-Milliken?

A. Approximately December 18th.

Q. Of what year?

A. On or about December 18th of 1951.

Q. How was that contact established, by telephone or personal call?

A. At first by telephone.

Q. Off the record. Mr. Mills, if you will permit me to finish my question before you commence your answer we will facilitate the job of the court reporter. It is very difficult to take two people talking at the same time.

A. I am sorry.

Q. You say that was by telephone you made that contact?

A. That is right.

Q. With whom did you speak on that first occasion, if you know?

A. I spoke to a party who said he was Mr. Lee Piersol.

Q. Will you relate that conversation that occurred on the telephone, stating what you said and what Mr. Piersol said?

A. I advised Mr. Piersol who I was and told

(Testimony of Leonard J. Mills.)

him that I was negotiating with the Government to manufacture a quantity [41] of liners for 75 mm shells and 105 mm shells, which would require rayon fabric to meet Specification PA-PD-29, in the quantity of approximately a million yards.

I suggested several widths that might be used, and asked him if I might have a quotation on those widths.

Q. What did Mr. Piersol say to you?

A. Mr. Piersol said he would get me a quotation on that and I told him I would appreciate his calling me as soon as he had such figures.

Q. Did you subsequently hear from Mr. Piersol with respect to your initial inquiry?

A. Yes. Mr. Piersol called me and later confirmed by letter the prices and quotations on the fabric I inquired for.

Q. Approximately when was it, to the best of your recollection, Mr. Mills, that Mr. Piersol first contacted you to give you a price quotation?

A. It was shortly after the 18th of December or shortly after I made the inquiry of him.

Q. You say on that occasion you also received a confirmation of the quotation by letter, is that correct, sir?

A. Yes, that is correct.

Mr. Lincoff: Please mark this.

The Clerk: Plaintiff's Exhibit 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Lincoff): Mr. Mills, I ask you if

(Testimony of Leonard J. Mills.)

that document which I have handed to you represents the first letter which you received from Mr. Piersol in response to your initial inquiry.

A. I believe it is.

Q. Was it received on or about the date that it bears? A. Yes, it was, January 10th.

Q. Of what year? A. 1952.

Q. Do you recall whether you received it through the mail or whether you obtained it by calling at Mr. Piersol's office?

A. I got the information first by a call from Mr. Piersol, and that was a confirmation of the phone call.

Mr. Lincoff: We will offer as Plaintiff's Exhibit first in order in evidence, your Honor, that which has been previously marked as Plaintiff's Exhibit 1 for identification.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 1 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to the date on which, which that letter bears, did you have any conversation with any representative of Deering-Milliken? A. Yes, I did.

Q. To the best of your recollection, approximately how [43] long after the date that that letter bears did you have such a conversation?

A. I believe that it was after the approximately 6th of February that—when I received word from the Ordnance Department that I was going to be considered for the contract for 105 mm shells only

(Testimony of Leonard J. Mills.)

and not the 75 mm shells, which contract was just a small portion of the total amount that I was considering.

The Court: May I ask a question concerning this Plaintiff's Exhibit 1? Had you ever heard of the expression "in the greige" before you got this letter, Exhibit 1?

The Witness: Yes, I have heard the expression "in the greige."

The Court: Did it mean anything particular to you as a layman?

The Witness: When I first spoke to Mr. Piersol there was—I gave him the specifications, PA-PD-29. In the specifications there was a list of requirements. One of the requirements was listed under the term "color."

That was the only requirement, where they had a choice of three things. In the color it could be either bleached white, unbleached or natural. All the other requirements were very specific as to what it was.

Mr. Piersol made the inquiry as to the price on the basis of "in the greige," meaning it didn't have to be [44] bleached white or colored. And the term "in the greige" there was referring to the color.

The Court: Had you heard of "in the greige" before your conversation with Mr. Piersol?

The Witness: Yes, sir. In the trade there when people refer to "in the greige"—they mean undyed goods. That was the only thing I understood "in the greige" to mean.

(Testimony of Leonard J. Mills.)

The Court: When you first talked to Mr. Piersol on the telephone and referred to PA-PD-29, did you use the term "in the greige" in the course of that conversation?

The Witness: No, sir. When I first spoke to him I read the requirements—I read the specifications to him and I also read the requirements there, and I pointed out that in the color there was a choice of three, and that the—and in our conversation Mr. Piersol, of course, explained—said that the undyed or natural, unbleached, rather, or natural, would be the least expensive item.

And then he made inquiry of New York and referred to me the price of "in the greige" meaning as to the color.

The Court: Well, is this letter, Exhibit 1, the first time that the specific words "in the greige" came into your communication between you and Mr. Piersol?

The Witness: That is right, sir.

The Court: Thank you. Counsel, you note occasionally the court asks questions. Whenever the court asks questions, [45] all counsel are invited to treat the court's questions as if they were put by an adversary. Hence, you may object as freely as if it were made by your adversary in the litigation.

Sometimes a judge, becoming interested in an ultimate legal problem, overlooks either rules of evidence or thinking of rules of evidence, and overlooks an ultimate question of relevancy and is just

(Testimony of Leonard J. Mills.)

as apt to commit error, in his interest to learn something, as counsel are in their diligence for accuracy. So don't be backward about it.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Lincoff): I have placed before you, Mr. Mills, a document which has been marked as Plaintiff's Exhibit 2 for identification. Do you recall having received that document?

A. Yes, sir, I do.

Q. And to the best of your recollection did you receive it on or about the date that it bears?

A. Yes, I did.

Q. By referring to that letter, is your recollection refreshed as to whether you had a conversation with Mr. Piersol on or about the date that letter bears?

A. Yes, sir, it does.

Q. Did you have a conversation with Mr. Piersol prior [46] to the receipt of the letter, Exhibit 2 for identification?

A. Yes, I did.

Q. That bears the signature of Henry Kramer, is that correct, sir?

A. That is right, sir.

Mr. Lincoff: Your Honor, I offer Plaintiff's Exhibit No. 2 for identification as Plaintiff's Exhibit 2 in evidence.

The Court: Admitted.

(Testimony of Leonard J. Mills.)

(The document heretofore marked Plaintiff's Exhibit No. 2 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to the receipt of Plaintiff's Exhibit 2 in evidence, did you have a conversation with any representative of Deering-Milliken? A. Subsequent to that letter?

Q. Yes.

A. I believe the next time I spoke to Deering-Milliken was after I was advised by the Government that on approximately February 6th, that I was to be considered and receive the contract on the—to manufacture the liners for 105 mm shells.

Q. You say this was about when?

A. About the 6th of February.

Q. How did you have that conversation, in person or over the telephone?

A. I first—I believe I first called Mr. Piersol. I then went over to his office and explained to him, and [47] showed him the blueprint and the specifications of the liner for the 105 mm shells and advised him I was to get the contract for that portion of the proposal.

I requested that Mr. Piersol, to get a current price on the quantity of goods that was required for just the 105 mm liners. This was a smaller quantity than for the quantity required for both shells.

Mr. Piersol said he would contact New York and get a current quotation. I showed him the blueprint, pointed out to him how simple it was to make the item. It consisted of two pieces of fabric, one which

(Testimony of Leonard J. Mills.)

was a rectangular shape, to be sewn with a seam down the side (indicating).

The second piece was to be a circle with a small hole in the center, which was to be cut on a clicking machine, such as used in the shoe industry, and that sewn to the rectangular piece that has the seam down the side, and the whole thing turned inside out (indicating).

I was emphasizing this to him because in our conversation just as a matter of interest I was pointing out how simple it was for the item to be made.

Pardon me. We further discussed the specifications. I pointed out to him that in my original inquiry I mentioned two specifications, PA-PD-29 and also PXS-1300. The reason for that was there were two blueprints, one for the 75 mm liner and the other for the 105 mm liner. However, I had [48] copies of both specifications. The requirements on both specifications were identical.

I pointed this out to Mr. Piersol so there would be no confusion in New York. I had asked Mr. Piersol whether he wants to send the specifications to New York, and he said no, it wasn't at all necessary, that the New York office had the copies of all these specifications.

He stressed how Deering-Milliken did millions of dollars in government business, and they had the specifications there and that all they need, all that need be sent back to New York is just the specifi-

(Testimony of Leonard J. Mills.)

cation number, and which he did on all further correspondence, PA-PD-29.

Mr. Lydick: May I have the original question?

The Court: The reporter will read it.

(The following question was read: "How did you have that conversation, in person or over the telephone?")

Q. (By Mr. Lincoff): Did you subsequently receive a letter in which you received quotations of the prices current at that time?

A. I believe I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Lincoff): I will place before you a document marked Plaintiff's Exhibit 3 for identification, previously shown to counsel, and ask you, Mr. Mills, if you received that letter.

A. I did receive the letter, yes.

Q. Did you receive it on or about the date it bears, to the best of your recollection?

A. I believe so.

Q. Do you recall whether you received it by mail or by personal delivery? A. By mail.

Mr. Lincoff: I offer Plaintiff's Exhibit 2 for identification in evidence now.

Mr. Lydick: 2 or 3?

Mr. Lincoff: 3.

The Court: Admitted.

(Testimony of Leonard J. Mills.)

(The document heretofore marked Plaintiff's Exhibit No. 3 was received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, you referred to specifications which you said you showed to Mr. Piersol on an occasion immediately preceding the receipt of Plaintiff's Exhibit 3. Is that correct? A. That is right.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 4 for identification. [50]

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Lincoff): I place before you two documents identified as Plaintiff's Exhibit 4, Mr. Mills, and I ask you to examine those and state whether or not those are the specifications which you showed to Mr. Piersol on the occasion of the conversation in his office.

A. These are the blueprints; not the specifications.

Q. I beg your pardon. I stand corrected. The blueprints to which you referred?

A. That is correct.

Q. You showed both of those to Mr. Piersol, did you? A. That is correct.

Mr. Lincoff: We will offer Plaintiff's Exhibit 4 for identification in evidence now, if your Honor please.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 4 was received in evidence.)

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): On the occasion you showed Mr. Piersol the blueprints, which are in evidence as Plaintiff's Exhibit 4, you stated, I believe, that you also showed him specifications, is that correct?

A. That is correct.

Mr. Lincoff: Please mark this.

The Clerk: Plaintiff's Exhibit 5 for identification. [51]

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Lincoff): I will place before you, Mr. Mills, Plaintiff's Exhibit 5 for identification, which are labeled as follows, on the upper right-hand corner of the document, this exhibit, consisting of three separate sets of specifications, is the designation "PA-PD-29, 2 March 1951, Amendment 1, 7 May 1951," and "PXS-1300, 2 June 1949."

I will ask you to examine those and state whether they are the specifications which you showed to Mr. Piersol on the occasion which you have last referred to?

A. They are.

Mr. Lincoff: I offer these in evidence, if your Honor please, as Plaintiff's Exhibit 5.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 5 was received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, subsequent to the receipt of the letter dated February 8, 1952, which is Plaintiff's Exhibit 3, did you have

(Testimony of Leonard J. Mills.)

any conversation with any representative of Deering-Milliken?

A. There were several conferences with Mr. Piersol.

Q. When was the first one you had subsequent to the date of February 8, 1952?

A. I don't recall just when and how they took place. [52] But for the period from February 6th until the period of March 6th I was negotiating with the Government in getting the contract drawn up, and at the same time getting delivery dates and such with Mr. Piersol.

My negotiations with the Government were along the lines on price there. I was able to secure a price of—a 10 per cent increase in the price——

Mr. Lydick: Excuse me. Are these presumed to be parts of conversations with Mr. Piersol, or is this testimony in which there was no party present from the Deering-Milliken organization?

The Witness: There was no party present from Deering-Milliken.

Mr. Lydick: I object to that. That evidence would be pure hearsay so far as this party is concerned.

Mr. Lincoff: The objection is well taken. The testimony may go out. I am asking only with respect to conversations you had with representatives of Deering-Milliken.

Q. (By Mr. Lincoff): My question was—I will repeat it—when was the first conversation you had

(Testimony of Leonard J. Mills.)

with a representative of Deering-Milliken subsequent to February 8th?

A. I do not recall when the first conversation took place, but I know that I spoke to him several times.

Q. All right. To the best of your recollection how soon after February 8th did you first speak with him? [53]

A. It is hard for me to place any specific time of any one of the several conversations. It finally consummated to a conversation on the date, which I remember distinctly, of March 6th.

Q. Now, can you state what the general, or if you can't remember dates, can you state what the general subject matter of the conversation was in the conversations which you say you had between February 8th and March 6th?

A. I was keeping Mr. Piersol advised as to the progress I was making on my contract with the Government. And also on delivery schedules, that the mill might be able to follow in getting the goods to me.

I was advising him, for example, I was securing a 90 per cent partial payment clause included in the contract, which was quite an important item.

Q. Anything further as to general subject matter? A. Prior to March 6th?

Q. Yes.

A. Only in several conversations on delivery schedules and such.

Q. Now, you have come to the date March 6,

(Testimony of Leonard J. Mills.)

1952. Did you have a conversation with a representative of Deering-Milliken on or about that date? A. Yes, sir, I did.

Q. Where did the conversation take place? [54]

A. At Mr. Piersol's office.

Q. Who was present?

A. Mr. Piersol was there, for one.

Q. Anyone else?

A. I am not sure.

Q. And you, of course, were there?

A. Yes.

Q. Now, will you relate the conversation that you had with Mr. Piersol on that occasion, stating what you said and what Mr. Piersol said?

A. I told Mr. Piersol that the Government was ready to give me a contract on the liners for the 105 mm shells. They only wanted confirmation from him to the fact that I had entered into a contract with Deering-Milliken to secure the fabric.

Q. What did Mr. Piersol say?

A. Mr. Piersol, after—I had requested at that time, too, that he call Mr. Burns, the representative of the Ordnance Department, and advise him of the fact we had entered into a contract. Mr. Piersol did call Mr. Burns in my presence and advise him of that.

Q. What did he say to Mr. Burns, as you heard him?

A. Mr. Piersol told Mr. Burns that Modern-Aire of Hollywood and Deering-Milliken have entered into a contract, and that Deering-Milliken

(Testimony of Leonard J. Mills.)

would supply the fabric for, the [55] rayon fabric for this contract, as per specifications, and so forth.

Q. All right. Did anything else transpire after the conversation between Mr. Piersol and Mr. Burns?

A. Yes. Mr. Burns, in the conversation Mr. Burns had requested Mr. Piersol for a letter of confirmation, which letter Mr. Piersol then dictated and gave to me.

Mr. Lydick: Excuse me. May we limit it to what you told Mr. Piersol and what Mr. Piersol told you. I object to the latter testimony of what Mr. Burns told Mr. Piersol over the telephone.

Q. (By Mr. Lincoff): Just state what you told Mr. Piersol in the course of your conversation on March 6th.

The Court: After we come to the end of this March 6th conversation we will take a recess, but we will not interrupt hearing this particular evidence.

Q. (By Mr. Lincoff): Just state, Mr. Mills, what you said to Mr. Piersol on the occasion of March 6th?

A. I requested of Mr. Piersol that—I told Mr. Piersol that Mr. Burns and the Ordnance Department wanted confirmation from Deering-Milliken that Modern-Aire of Hollywood had entered into a contract with Deering-Milliken to secure the fabric for this contract.

Q. Then Mr. Piersol made a telephone call?

A. He made the telephone call to Mr. Burns.

(Testimony of Leonard J. Mills.)

Q. What did you hear him say?

A. He told Mr. Burns that Modern-Aire of Hollywood and Deering-Milliken had contracted for the purchase by Modern-Aire of the necessary rayon for this contract.

Q. Then what did Mr. Piersol do?

A. Mr. Piersol then dictated a letter in my presence, to Modern-Aire of Hollywood, advising we had entered into a contract for the purchase of the required goods, and noted on that letter that it was for the information, particularly for the information of the Ordnance Department.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Lincoff): Mr. Mills, I place before you Plaintiff's Exhibit 6 for identification, and ask you to read it and state whether that was the letter which was dictated in your presence.

A. This is the letter.

Q. Was it signed in your presence by Mr. Piersol? A. Yes, it was.

Q. And it was executed on or about the date it bears? A. That is correct.

Mr. Lincoff: We offer Plaintiff's Exhibit——

Mr. Lydick: Excuse me, Mr. Lincoff. Would you mind [57] telling me, so I will have it clear in my mind, is this the letter that starts out, "We have consummated a contract," or is it the other one?

(Testimony of Leonard J. Mills.)

Mr. Lincoff: I believe it does.

The Witness: It reads—pardon me. It reads, “We understand from our conversation today in this office we have consummated a contract with you.”

Mr. Lydick: I understand which letter it is.

Mr. Lincoff: We will offer Plaintiff’s Exhibit 6 in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff’s Exhibit No. 6 was received in evidence.)

Mr. Lincoff: Your Honor, March 6th is a two-phase operation, so to speak. If your Honor wants me to complete it, I shall.

The Court: I just don’t want to break the sequence of something that you particularly have in mind.

Mr. Lincoff: Very good, sir.

The Court: However, if this is a distinctly different phase, we ought to be taking our lunch hour.

Mr. Lincoff: I think we can conclude this in about five minutes.

The Court: Go ahead.

Q. (By Mr. Lincoff): Did you on or about that same date [58] receive another letter from Mr. Piersol? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff’s Exhibit 7 for identification.

(The document referred to was marked Plaintiff’s Exhibit No. 7 for identification.)

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): Mr. Mills, I hand you Plaintiff's Exhibit 7 for identification, and ask you to examine it and state whether that is the letter you received from Mr. Piersol? A. It is.

Q. Did you receive it on or about the date that it bears? A. I did.

Q. Do you recall whether that letter was dictated and typed in your presence, or whether you received it through some other way?

A. I believe that it was dictated and typed in my presence.

Q. Did you have a conversation with Mr. Piersol with respect to this letter, Plaintiff's Exhibit 7 for identification?

A. Nothing other than what is in the letter.

Mr. Lincoff: I see. We will offer Plaintiff's Exhibit 7 now, for identification, in evidence. [59]

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 7 was received in evidence.)

The Court: While marking Exhibit 7, may I look at 6?

The Clerk: Yes, sir.

Mr. Lydick: Your Honor please, I couldn't help but overhear that remark. While you are looking at 6, would you mind looking at 7?

The Court: I intended to say, "While you are marking 7, may I look at 6?"

Mr. Lydick: I intended to say, "While you are looking at 6, will you also look at 7?"

Mr. Lincoff: I think this would be an appropri-

(Testimony of Leonard J. Mills.)

ate place, after your Honor has read the document, for our recess.

The Court: You don't want to sit here while I look at the exhibits, I know. If the clerk will give me Exhibit 7 after he has marked it, we will take our recess.

The Clerk: Yes, sir.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [60]

Afternoon Session, 2:00 p.m.

Mr. Lincoff: If your Honor please, Mr. Klein was delayed by what appears to be an emergency call. He will be here momentarily.

The Court: We didn't recess right at 12:00. We can either proceed——

Mr. Lincoff: Yes. I simply wanted to explain his absence.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lincoff): Mr. Mills, what did you do after you obtained the letters of March 6th, Plaintiff's Exhibits 6 and 7?

A. I took the two letters of confirmation over

(Testimony of Leonard J. Mills.)

to Mr. Burns at the Ordnance Office and showed him the letter of confirmation for the Government files, and the letter of confirmation for my own files.

Q. Now, did you subsequently have any communication from or conversation with representatives of Deering-Milliken?

A. A few days later, approximately the 10th of March, I received the advance copy of the Government contract confirming our contract of March 6th, and called Mr. Piersol and told [60] him I had the advance copy of the contract.

Q. What did Mr. Piersol say?

A. Mr. Piersol said he would pass that information on to New York.

Q. Did you then go to Mr. Piersol's office at or about that time? A. I am not sure.

Q. Was there anything else said by Mr. Piersol with respect to any call to a representative of Deering-Milliken?

A. Mr. Piersol did suggest and ask me to call Mr. Smith, the credit manager—the credit man of Deering-Milliken and explain to him the 90 per cent partial payment clause which I had in the Government contract, which call I did make.

Q. Did you speak with someone in New York on the occasion of that call?

A. Yes. I spoke to the party that said he was Mr. Smith, the credit man. I explained to him the 90 per cent partial payment clause I had in the contract, that the Government would give me the entire

(Testimony of Leonard J. Mills.)

amount of the invoice as the goods arrived for each shipment.

On the basis of our conversation he specified that the 10 per cent payment in advance for the last 10 per cent quantity of the goods to be purchased should be made in advance on my contract with Deering-Milliken. [62]

Q. Now, did you subsequently report your conversation to Mr. Piersol?

A. I called Mr. Piersol and passed the information on to him.

Q. What did he say?

A. He said that was fine. And shortly after that, about the 14th of March I received a note, memorandum of sale confirming our contract.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 8 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Lincoff): I place before you, Mr. Mills, Plaintiff's 8 for identification. Is that the document which you refer to as the memorandum of order which you received? A. It is.

Q. About when did you receive it, to the best of your recollection?

A. Approximately the 14th of March.

Q. Did you receive it by mail or did you receive it by a call at Mr. Piersol's office?

A. No, sir, I got it in the mail.

(Testimony of Leonard J. Mills.)

Mr. Lincoff: We will offer that document in evidence as Plaintiff's Exhibit 8.

The Court: Admitted. [63]

(The document heretofore marked Plaintiff's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to March 14th did you have any communication from or any conversations with any representative of Deering-Milliken?

A. Not until approximately the 20th of March, when Mr. Piersol called me to say that he got a request from New York asking for a check in the amount of approximately \$4,500.00 in payment of that 10 per cent item.

Q. What did you do?

A. I immediately carried the check over to his office and presented it to him.

Q. Did you have a conversation with him when you went to his office with the check?

A. I gave him the check and he accepted it at the time, that was about all.

Q. Did he say what he was going to do with it?

A. I assumed he was forwarding it to New York.

Q. Did he say that?

A. No—I am not sure at this point.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 9 for identification.

Mr. Lincoff: Also this.

(Testimony of Leonard J. Mills.)

The Clerk: Plaintiff's Exhibit 10 for identification.

(The documents referred to were marked Plaintiff's Exhibits Nos. 9 and 10 for identification.) [64]

The Court: As these exhibits are marked I would like to have them passed up, Mr. White.

The Clerk: Marked for identification?

The Court: Wasn't one just admitted?

The Clerk: Yes, sir. I have that.

Q. (By Mr. Lincoff): I will place before you, Mr. Mills, Exhibit 9 for identification and ask you to state whether or not that is the check that you delivered to Mr. Piersol.

A. This is the check.

Q. Did you deliver it on or about the date it bears?

A. I delivered it on the date that it bears.

Q. You delivered it by taking it personally to Mr. Piersol? A. Yes.

Mr. Lincoff: I ask that Plaintiff's Exhibit 9 be admitted in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit 9 was received in evidence.)

Q. (By Mr. Lincoff): I will also now place before you, Mr. Mills, a letter which has been marked as Plaintiff's Exhibit 10 for identification, and ask you to examine it before I ask you my next question. A. (Witness complies.)

Q. Did you receive that letter? [65]

(Testimony of Leonard J. Mills.)

A. This is the receipt that I received for the check which I gave Mr. Piersol.

Q. Did he send that to you through the mail or was it prepared in your presence in the office?

A. It was prepared in my presence in the office.

Q. And handed to you—

A. Handed to me.

Q. —about the time you gave him the check?

A. That is correct.

Mr. Lincoff: We offer Plaintiff's Exhibit 10 for identification in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 10 was received in evidence.)

Q. (By Mr. Lincoff): Did you subsequently, Mr. Mills, have any conversation with a representative of Deering-Milliken?

A. Approximately the 21st of March Mr. Piersol called me and advised me he had just received a TWX from New York advising they had difficulty in meeting the specifications at the mill.

Q. Was that by telephone that you had this conversation? A. Yes.

Q. What did you do at the conclusion of the telephone conversation? [66]

A. I told Mr. Piersol on the phone I was coming over immediately, and I immediately proceeded to his office.

Q. Did you have a conversation with him when you arrived in his office?

A. Yes, I did.

(Testimony of Leonard J. Mills.)

Q. Will you relate the conversation, stating what you said and what he said?

A. Mr. Piersol showed me the TWX and said that it seemed there was something to be—some delay in my getting the shipment, the first shipment of goods in order to meet the specifications. What could possibly be done.

I suggested that I take the TWX over to the Ordnance Department and ask them if there could be some postponement in the initial delivery schedule for the first shipment.

Mr. Piersol also suggested that if that wasn't satisfactory, to see if I could secure enough goods for just that first shipment, so that I could—to proceed on schedule.

Q. Do you recall what the amount of the first shipment was to be?

A. It was approximately 20,000 yards.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 11 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Lincoff): I will place before you what is now [67] designated as Plaintiff's Exhibit 11 for identification, and ask you if that is the document which Mr. Piersol handed you.

A. It is.

Q. On the occasion when you went to his office on the 21st? A. That is correct.

Mr. Lincoff: Your Honor please, with your per-

(Testimony of Leonard J. Mills.)

mission I should like to read this into the record, if I may, sir.

The contents of this teletype:

“Mr Lovett Calling Mr Piersol Re Modern-Aire Spec—“s p e c—”—Calls For Min Porosity—”

Mr. Lydiek: Excuse me. May I just see it, to make sure once again?

Mr. Lincoff: Surely.

Mr. Lydiek: Would you be good enough to read it as it is, because I am not sure you will always interpret their short terms as they should be?

Mr. Lincoff: I will start over, Miss Reporter.

“Mr Lovett Clg Mr Piersol Re Modern Aire Spec Calls For Min Porosity of 35 Cubic Ft Per Min Per Sq Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Govt Spec In Order to Correct This Would Require Too Long a Time And We Be Unable To Meet Delivery Do Everything Possible [68] To Have Cust Accept.”

Below that in blue ink appears, “Received Mar 21 1952.”

The Court: Now, Mr. Witness, I know that some of the people in the courtroom apparently are interested in the case and that they are sometimes leaning forward to hear you. The reason we ask counsel to conduct as much as possible of the questioning from the lectern is so that the witnesses will speak out.

I just remind you of the necessity of speaking out with a little more vigor than we are accus-

(Testimony of Leonard J. Mills.)

tomed to using in this courtroom, because it is a large room and it has a somewhat noisy air-conditioning system, and it is a little difficult sometimes for people seated several feet away from the witness stand to hear what the witness is saying.

Speak out to this gentleman, bearing in mind all the other gentlemen in the courtroom wish to hear you.

The Witness: Yes, sir.

Mr. Lincoff: We will offer Plaintiff's Exhibit 11 for identification in evidence at this time, if your Honor please.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 11 was received in evidence.)

Q. (By Mr. Lincoff): What did you do following the conversation you had with Mr. Piersol at which he made these [69] various suggestions to you?

A. I took the TWX from Mr. Piersol and proceeded to Mr. Burns' at the Pasadena Ordnance Office. I showed the TWX to Mr. Burns and asked what could be done at this time. Colonel Heath, I believe, also saw the TWX then.

The question then came up as to how we could possibly proceed without any delay to the Government, as this contract was——

Mr. Lydick: If your Honor please, we are talking about conversations at which no representative of my client, at least, was present. Whether we

(Testimony of Leonard J. Mills.)

bring it out by saying he said and I said, it is still hearsay. I object to it.

Mr. Lincoff: The objection is well taken. The objection is good. The testimony may be stricken.

The Court: So ordered.

The Witness: I proceeded to Pasadena Ordnance Office and showed the TWX to Mr. Burns and to Colonel Heath.

Q. (By Mr. Lincoff): Did you subsequently communicate with Mr. Piersol?

A. I called Mr. Piersol, I believe, the following day or possibly the same day and advised him that the Government wanted the contract to proceed without delay. I also told him what they suggested I do, which I did do.

Q. What did you tell him that they had suggested you do? [70]

A. I told him that they called the Joliet office of the Ordnance Department and inquired of that office for the names of any mills that are supplying that fabric to other suppliers, contractors for the same item.

They secured the name of a Paul Whitin Company, who in turn—whose representative happened to be in Chicago at that particular time. I called this representative in Chicago—

Q. Are you telling—

A. I am telling Mr. Piersol this.

Mr. Lydick: All of this was told to Mr. Piersol?

The Witness: To Mr. Piersol, that is right.

(Testimony of Leonard J. Mills.)

The Court: Including what you told the man in Chicago?

The Witness: That is right. I told Mr. Piersol I called this representative of Paul Whitin Manufacturing Co. in Chicago, and asked him for the approximately 20,000 yards, and whether that could be supplied as quickly as necessary.

I also told Mr. Piersol he advised me he could and gave me the price of that fabric, and that the additional cost to me amounted to \$1,600.00 for just that 20,000 yards.

Q. (By Mr. Lincoff): What did Mr. Piersol say?

A. Mr. Piersol thought that was a possibly fair solution and said he would send the information to New York.

Q. Did you subsequently hear from Mr. Piersol?

A. Yes. Mr. Piersol then called me on the following day, I believe, and he advised me he received an answer from [71] New York.

Q. Did he tell you what the answer was?

A. Yes. He said that New York advised him that the delay wasn't only for this first portion of the goods, as he and I had interpreted the TWX, but it was for the entire amount.

Q. Was anything else said?

A. Well, he also emphasized there was nothing further he could do at this point.

Q. And then what did you do subsequent to that conversation with Mr. Piersol?

A. I then immediately went up to the Pasadena

(Testimony of Leonard J. Mills.)

Ordinance Office and passed the information on to them.

Q. Now, did you subsequently attempt to procure the goods elsewhere? A. Yes, I did.

Q. What did you ascertain with respect to the cost of procuring the goods elsewhere?

A. That the goods would cost me approximately \$10,000.00 additional and there was no assurance as to the time within which I would be able to secure this goods.

I also learned that the Pasadena Ordnance Office was attempting to get their Washington office to enforce, to try to force Deering-Milliken to proceed with the contract.

Mr. Lydick: Now, your Honor,——

Mr. Lincoff: That may be stricken as hearsay. The [72] objection to be made would be well taken.

The Court: So ordered.

Mr. Lydick: If the court please, I beg that the witness be cautioned——

The Court: What was that last?

Mr. Lydick: I have a feeling that perhaps the witness needs to be cautioned with respect to repeating conversations he had out of the presence of our clients or any representative.

The Court: Yes. I gather, sir, you are not particularly accustomed to courtroom procedure.

The Witness: No, sir, I am not.

The Court: The procedure and evidence. We have what lawyers call a hearsay rule. Insofar as that rule is concerned, it is simply that you cannot

(Testimony of Leonard J. Mills.)

tell what the conversations were with parties, except those whom are parties to the suit; that is, you can tell what conversation you had with Mr. Piersol or others in the defendant corporation, but you can't tell what conversations you had with the Army or with people in other places, unless one of the defendant's representatives was also present.

The Witness: I see.

The Court: So just try to avoid bringing that in. And if you are successful in that, it will prevent the attorneys from bobbing up and continually asking that part of your [73] answer be stricken.

The Witness: Yes, sir.

Q. (By Mr. Lincoff): Mr. Mills, did you sign a contract with the Government of the United States? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 12 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Lincoff): I hand you a document which is now marked as Plaintiff's Exhibit 12 for identification, and direct your attention to the last page thereof. Is that your signature? Does your signature appear on the last page of the document?

A. It does.

Q. Will you read, please, the manner in which the signature element appears?

A. It reads, "Modern-Aire of Hollywood, Inc. by Leonard J. Mills, President," with my signature under it.

(Testimony of Leonard J. Mills.)

Q. When did you sign that document, to the best of your recollection?

A. It was approximately the 12th, 13th of March.

Q. Were the signatures or signature elements, other than yours, on the document when you signed it?

A. No,—well, there was just the Government signature [74]—no, I don't believe the Government signature—I am not sure now whether there was another signature or not.

Q. When did you, to the best of your recollection, when is it that you yourself signed that?

A. Immediately upon its receipt.

Q. I notice on the face of the document, Mr. Mills, on the front page, designated as a triplicate, did you sign other counterparts of that document?

A. If I may go back to your previous question, on reading the letter of transmittal I do now know when I got the contract it was signed by the Government.

Q. Were there other counterparts of that contract forwarded to you for signature?

A. Yes, there were three copies. This is a triplicate signed—enclosed for your files, a triplicate signed document for your files, is what it reads.

Q. Did you sign the other two?

A. Yes.

Q. And forwarded them to the Government?

A. Yes, I did.

(Testimony of Leonard J. Mills.)

Mr. Lincoff: We offer this in evidence as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 12 was received in evidence.) [75]

Q. (By Mr. Lincoff): Mr. Mills, did you at any time subsequent to March 21, 1953, receive any demand for the payment of moneys from any agency of the United States Government?

A. Yes, I did.

Q. If you recall, in what form did you receive that demand?

A. It was in the form of a letter.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 13 for identification and 14 for identification.

(The documents referred to were marked Plaintiff's Exhibits Nos. 13 and 14 for identification.)

Q. (By Mr. Lincoff): I hand you Plaintiff's Exhibit 13 for identification, and ask if this is the document which you received from an agency of the United States Government. A. It is.

Q. When did you receive it, to the best of your recollection, Mr. Mills?

A. Approximately the 8th of July.

Q. And that is the date it bears?

A. Yes, it is.

Mr. Lincoff: We will offer that in evidence as Plaintiff's Exhibit next in order.

The Court: Admitted. [76]

(Testimony of Leonard J. Mills.)

(The document heretofore marked as Plaintiff's Exhibit No. 13 was received in evidence.)

Mr. Lydick: Your Honor please, we have no objection to the admissibility of the letter insofar as it having been a document that is mailed and received by Mr. Mills.

However, I think it and the next document are documents before any interpretation be placed on them by the court, that they require an explanation by the person that wrote them.

If in any way they do require an explanation, I wish the court would keep that in mind at the time it reviews it, as the persons who wrote the letters are not here, as appears in other instances in the case. Words don't always speak exactly what they say. It seems to me the documents as letters are all right, but the contents of them, we consider that there be no evidence of the truth and falsity of the contents with respect to them, without having the people here who wrote them.

The Court: Do you contend they are patently ambiguous?

Mr. Lydick: I had never seen these letters before until five minutes ago. I couldn't tell you what the contents of them are. I know this one generally refers to some claim by the Government, and I think the one coming up is called some sort of notice of termination, because of default.

They appear to be that before the court should give much weight to them, that the persons who

(Testimony of Leonard J. Mills.)

wrote them should explain [77] the circumstances under which they were written.

The Court: Your point then goes to the weight to be accorded, rather than the admissibility?

Mr. Lydick: That is correct, sir.

The Court: I take it as an invitation for the production of other evidence.

Mr. Lydick: If it were a jury matter, I would make a much stronger objection. Under the circumstances I limit my objection merely of bringing it to the court's attention, the possibility that full weight not be given them.

The Court: We don't consider that an objection. That is argument on the weight of the evidence. Objection goes to the admissibility, of course.

The document is admitted. I think I said it was admitted. However, if you are making an objection to the court's seeing it or having it in evidence for study, that would mean the appraisal by the court in the light of all the other evidence and the legally pleaded issues. If it isn't entitled to much weight, we will try not to give it much weight. If it is entitled to a great deal of weight, that is something we have to measure.

Mr. Lydick: We do not object to the admissibility of this first letter in any way. We believe that on its face it appears to be a letter that was sent by someone to Mr. Mills. [78]

Mr. Lincoff: Thank you.

Q. (By Mr. Lincoff): Mr. Mills, prior to receiving Plaintiff's Exhibit 13 in evidence, did you re-

(Testimony of Leonard J. Mills.)

ceive another document in connection with default or alleged default under the contract which you had with the Government? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: 14 for identification.

Q. (By Mr. Lincoff): I will place before you what has been marked as Plaintiff's Exhibit 14 for identification, and ask you to state whether that is the document that you received prior to the receipt of Plaintiff's Exhibit 13? A. It is.

Q. Approximately when did you receive it, to the best of your recollection?

A. On the 2nd of June, 1952.

Mr. Lincoff: We will offer this exhibit as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 14 was received in evidence.)

Q. (By Mr. Lincoff): Mr. Mills, have you made payment of the sum of \$4,100.66 to the Government of the United States? A. I did not.

Q. Have you ever received delivery of any of the cloths [79] which you ordered from Deering-Milliken? A. I did not.

Mr. Lincoff: You may cross examine.

I beg your pardon, Mr. Lydick. There is one thing counsel reminds me of.

Q. (By Mr. Lincoff): Mr. Mills, did you make a computation of the total cost to you of the production of the liners which were called for in the

(Testimony of Leonard J. Mills.)

contract which you had with the Government of the United States? A. I did.

Q. What was the result of your computation? At what figure did you arrive with respect to the total cost?

A. Approximately \$57,100.00.

Q. The contract which is in evidence contains the figure, of course, which you were to receive from the Government upon performance?

A. That is correct.

Q. Have you received any payment of any moneys from Deering-Milliken?

A. I have not.

Q. You have not received delivery of the merchandise? A. No, I have not.

Mr. Lincoff: You may cross examine. [80]

Cross Examination

Q. (By Mr. Lydick): Mr. Mills, a good deal of this may seem repetitive to you, because it will be covering at times subject matter you just got through discussing with your counsel. I trust you will bear with me if it does seem repetitive, and follow through with the answers.

The Court: Since you have said you are not familiar with courtroom procedure, while your own attorney was questioning you, he was considerably limited by a rule that prohibits the asking of leading questions and so on, except on preliminary matter.

If he asked, "Your name is Jones, is it," that

(Testimony of Leonard J. Mills.)

would be preliminary. For him to say, "You entered into a contract, didn't you," would merely call for you to say yes or no, and the suggestion is carried in the question that you should say yes.

Your own attorney isn't allowed to do that. On cross examination the attorney who is now asking you questions, is adverse to you, he is trying to win a lawsuit against you. Instead of one who is apt to try to lead you into something favorable, if there is any leading, he would lead you into something unfavorable. He has a right to do that.

He can ask you all the leading questions he wants to. That is within the rules of evidence. [81]

The Witness: I see.

The Court: It becomes important, therefore, you understand what he is asking before you answer.

The Witness: I see.

The Court: If you don't understand the question, tell him so, and being a gentleman, he will straighten it out for you.

Then after you know what he is asking, think for a moment so you are giving a considered answer. Just look out if he asks you a leading question, that if you answer yes, that you are answering because yes is the right answer and not just to be accommodating, because you are going to be held to what comes out on cross examination.

The Witness: I see, sir. Thank you.

Q. (By Mr. Lydick): As long as we are on the subject, Mr. Mills, have you ever at any time before been a party to any civil or criminal action, or have

(Testimony of Leonard J. Mills.)

you ever appeared as a witness in any action whatsoever? A. Yes.

Q. How many times? A. Once, I believe.

Q. Where was that?

A. Here in Los Angeles.

Q. You appeared as a witness in that action?

A. I did. [82]

Q. How many times have you had your deposition taken Mr. Mills? A. Once.

Q. No deposition was taken in the other matter?

A. No.

Q. This is not your first courtroom appearance, is it?

A. No, it isn't. But I am not experienced, sir.

The Court: You mean you are not extensively experienced.

The Witness: That is right, sir.

Q. (By Mr. Lydick): Nor I, Mr. Mills. I have never been on the stand. You were discussing your education when your counsel was questioning you, and it seemed to me I lost the chronology somewhere along between your education and the time you worked with your father and your going into the war.

You were born in 1913. Would you tell me when you first went to New York University?

A. About 1933.

Q. I see. You were there for three years?

A. That is right, sir.

Q. That would be 1936 or 1937 when you left there? A. That is right, sir.

(Testimony of Leonard J. Mills.)

Q. Which?

A. Well, there was a year during that time there I was out of school because I had my appendix taken out. It was too late to go back into school in the school year. I [83] took a position with Stock Bros. Ribbon Corporation and was traveling on the road that one year.

Q. You were in school then in 1937?

A. That is correct.

Q. Then you went with your father, did you say?

A. I was always with my father.

Q. In mean in business.

A. In business, that is correct. We were always working together; worried together and enjoyed business together, and so on.

Q. What was that business again?

A. He was manufacturing.

Q. The name of the business?

A. His business?

Q. Yes.

A. Well, manufacturing; it was Equitable Hat Company.

Q. Equitable Hat Company?

A. That is right.

Q. That was located in New York?

A. In New York City. He also had a retail millinery shop. My mother first ran one while he was manufacturing; it was on Fordham Road.

Q. What was the name of that shop?

A. The Rose Millinery Shop on Fordham Road.

(Testimony of Leonard J. Mills.)

He then opened up three more shops and dropped out of the manufacturing [84] business.

Q. You worked in all parts of this hat business?

A. Yes.

Q. You manufactured hats, did you say?

A. Millinery, ladies' hats.

Q. You manufactured ladies' hats?

A. Yes.

Q. What did you do with respect to your duties in the manufacture of ladies' hats?

A. Everything from sweeping, packing, shipping, selling, office work.

Q. How old were you at the time you first started in?

A. As far back as I can remember; even maybe as young as 13 part time.

Q. I am speaking more of your full-time participation after you graduated from the university.

A. While I was going to the university, there was only the first year I went to the university during the day, and the last two years I went to the university was at night.

Q. Did you have any law training while you were at the university?

A. No.

Q. Have you had any since that time?

A. No, I did not.

Q. Tell me then, Mr. Mills, where did you go after you [85] left your father?

A. I didn't leave my father.

Q. Well, your father's business and your employment there was terminated for some reason.

(Testimony of Leonard J. Mills.)

A. My father passed on. I stayed on in the business with my mother.

Q. How long did that last?

A. Until approximately 1940.

Q. At that time you——

A. I moved to Oregon.

Q. Portland, Oregon? A. That is right.

Q. Was your father's business continued during the period you and your mother alone were there?

A. The retail business? Yes, we were running it.

Q. No. I mean the Equitable Hat Company.

A. No. He went out of that business when he opened up the additional millinery stores.

Q. I see. Exactly what period of time after you left New York University were you with your father in the manufacturing of hats, at any time?

A. No, I believe he went out of the manufacturing business—I am not at all sure of the year.

Q. Is it a fair statement to say——

A. When I left the university. [86]

Q. ——after you left the university you at no time engaged in any business involving the manufacturing of hats, but it was simply the retail part of it? A. That is correct.

Q. I misunderstood your original testimony. What other experience have you had in textile industry, other than this connection with your father and mother?

A. The first experience I had in the textile industry was when I took over Modern-Aire of Holly-

(Testimony of Leonard J. Mills.)

wood and started negotiating on Government contracts.

Q. I understand Modern-Aire of Hollywood has never manufactured any quantity of textile products of any kind or nature.

A. On the contrary, they were in business for several years; I don't know how long.

Q. I mean since you took it over.

A. Since I took it over, no.

Q. Since you have had a connection with Modern-Aire of Hollywood they have never manufactured anything of a textile nature, or anything else?

A. After the Deering-Milliken incident we did.

Q. You did? A. Yes.

Q. What did you manufacture after that?

A. Ladies' sportswear. [87]

Q. Didn't you tell me at the time of your deposition that the company had been inactive since May or June of 1952?

Mr. Lincoff: I will object, if your Honor please, on the ground this is not the proper method of impeachment. I think it is not proper to summarize the deposition.

If my understanding of the law is correct, the question should be read and the answer given as it appears in the deposition.

Mr. Lydick: I will be very happy to do so.

The Court: If there is impeachment, that is true. I took it from the question that it was rather asking for clarification, rather than undertaking to impeach.

(Testimony of Leonard J. Mills.)

Counsel can be guided by those comments, whether he is going to impeach or ask for clarification.

Q. (By Mr. Lydick): Do you have any recollection of any testimony at the time of your deposition regarding the activities of Modern-Aire of Hollywood since May or June of 1952?

A. I am not sure. If you are referring to that particular period, there was a period of three months in which another party and I manufactured ladies' sportswear.

Q. When was that period?

A. Approximately September, October, November, maybe part of December of 1952.

Q. We will return to your deposition later. We can go on now. [88]

Other than this, have you had any experience whatsoever in the textile industry? This experience you had with ladies' sportswear was subsequent to your dealings with Deering-Milliken?

A. That is correct.

Q. Have you ever had any other experience in the textile industry prior to your dealing with Deering-Milliken?

A. Not in fabricating textiles. I have bought and sold textiles.

Q. What textiles did you buy and sell, Mr. Mills?

A. Cotton goods, government surplus, yardages.

Q. Will you explain what you did in that con-

(Testimony of Leonard J. Mills.)

nection, from whom you bought them and to whom you sold them?

A. Yes. For example, I purchased a large quantity of cotton goods from the Government. On part of that I had it on a contract basis, manufactured into handkerchiefs. This was in 1946 or early '47.

Q. When did you come out of the Armed Services, Mr. Mills?

A. May of '46. The balance of the goods I sold off as it was.

Q. Any other experience? I take it when you purchased this goods from the Government, why, it was not directly from the manufacturer in any way.

A. No. [89]

Q. It was simply a government surplus transaction? A. That is right.

Q. Any other?

A. Yes. There was burlap I purchased and sold.

Q. Where did you purchase that?

A. From the Government.

Q. To whom did you sell that?

A. To various sources of—

Q. Another surplus purchase and sale?

A. No. They were manufacturers of burlap bags, furniture manufacturers.

Q. This was another part of your surplus business, I mean, L. J. Mills & Company, your surplus business? A. That is correct.

Q. Any other textile experience?

A. I don't recall any prior to Deering-Milliken incident.

(Testimony of Leonard J. Mills.)

Q. Can you tell me——

A. May I correct that? There was the negotiation and seeking of the government contract on parachutes, of course, which did require going into nylon and nylon cloth for the parachutes, and getting prices on it, getting types of nylon that was required for different types of chutes, and such as that.

Q. Did you purchase any cloth on that contract? [90]

A. Just enough for some chutes that were required.

Q. That contract was not completed?

A. There was no contract. The contract was never let.

Q. You never got the contract from the Government? A. That is correct.

Q. Now, tell me a little bit about Modern-Aire itself. When did you first come into the company?

A. I believe it was sometime the early part of 1951.

Q. Was it an active company at that time, manufacturing anything?

Mr. Lincoff: Your Honor please, at this time I wish to object on the ground, although this may be within the scope of direct examination, I respectfully submit it is on a completely immaterial matter. I think it is of no moment what the conditions were under which parties became stockholders or officers or directors of a corporation.

There is no denying in the pleadings this was a

(Testimony of Leonard J. Mills.)

validly formed corporation and existed as such. That isn't denied in the pleadings.

For the matter of breach of contract, I think it is wholly immaterial with respect to these matters into which Mr. Lydick is now inquiring.

The Court: I gathered from the opening statements that the familiarity of this witness with the business procedures in the particular type of business might be relevant. This [91] question seems to be a preliminary question as to inquiry in that field. The particular objection is overruled.

Mr. Lydick: I don't intend to inquire at all into the stock ownership of these things. I don't even remember my own last question now.

(The question was read.)

Q. (By Mr. Lydick): I didn't mean actively in a stock sense. Was the company manufacturing anything when you took it over?

A. No, it wasn't.

Q. As I recall, you obtained complete control of the company when?

A. Sometime in the middle of 1951.

Q. Would you say that was June or July of 1951, or during the time you were dealing——

A. Possibly, possibly September of 1951.

Q. September of 1951. In other words, then in essence this I will point out is leading to you. Of course, at all times you had dealings with Deering-Milliken you were the sole operator of Modern-Aire of Hollywood, Inc.?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. What was the average employment at Modern-Aire of Hollywood, Inc., during the period December 1951 to June 1952?

Mr. Lincoff: Objected to, if your Honor please, as [92] incompetent, irrelevant and immaterial, and not within any of the issues of this case.

The Court: Overruled.

Mr. Lydick: I didn't hear the ruling, your Honor.

The Court: Overruled.

Q. (By Mr. Lydick): Would you like the question? A. Yes, please.

(The question was read.)

The Witness: December of 1951 to June of 1952?

Q. (By Mr. Lydick): Yes.

A. I was the only one in Modern-Aire of Hollywood, except at the time that I received the government contract and I had hired a foreman, who was with me for several weeks setting the plant up.

Q. What time did you hire him?

A. Approximately March of 1952.

Q. Was it before or after the time that the executed contract with the Government was signed?

A. It was at the time the executed contract——

Q. At the time? A. That is right.

Q. He had not been employed by you before?

A. He was employed for the purpose of the contract.

Q. I see. But he had not been employed by you before that time? [93]

A. No; he wasn't, no.

Q. So he hadn't assisted you, for example, in

(Testimony of Leonard J. Mills.)

the review of the various specifications if there had been such a review? A. No.

Q. My recollection of your testimony is that someone from the United States Government contacted you late in 1951, to ask you if you would be interested in manufacturing certain textile items for the Government, is that correct?

A. That is correct.

Q. Do you have any recollection as to who that was? A. No, I don't.

Q. Do you have any recollection as to where the contract was made?

A. I believe it was possibly by mail.

Q. You believe it was possibly by mail?

A. Yes, I believe it was by mail.

Q. They were writing to you or Modern-Aire of Hollywood?

A. They were writing to Modern-Aire of Hollywood.

Q. Possibly as a result of the former manufacturing——

A. As a result of my negotiation they got my name from Wright Field, as a result of my negotiations with Wright Field to get a parachute contract. Either Wright Field referred my name to them as a source or they asked for it, [94] I am not sure.

Q. I don't remember your testimony with respect to your Wright Field negotiations. What were those negotiations?

A. We were trying to get a parachute contract from Wright Field.

(Testimony of Leonard J. Mills.)

Q. "We," meaning Modern-Aire of Hollywood?

A. Yes. To manufacture parachutes.

Q. It was not obtained?

A. No, it was not.

Q. What were these items they contacted you late in 1951 regarding? What did they want you to manufacture?

A. Liners for 75 and 105 mm shells.

Q. That was the only item?

A. That was the only item under discussion.

Q. Were there any items that they subsequently contacted you about?

A. No, because we were negotiating on that particular item.

Q. Were there any items they contacted you about before, other than the parachutes?

A. The Ordnance Department? No, they didn't. There was some conversation later that asked whether I could make flare chutes for them. That was while I already had the contract on—or was negotiating on the contract for the liners. [95]

Q. When were you attempting to or did you ever attempt to get a contract for surgical drapes from the Government?

A. Yes, I did.

Q. Did you obtain that contract?

A. No.

Q. Have you ever manufactured any technical items for the Government, other than samples?

A. No, I did not.

Q. Had Modern-Aire of Hollywood, if you know?

A. Not while I had it, other than samples.

(Testimony of Leonard J. Mills.)

Q. Now, with respect to these interliners they contacted you about, what did they want you to manufacture?

A. Liners for——

Q. What are they, Mr. Mills?

A. 105 mm shells and 75 mm shells have a liner inside which, I understand, holds the powder of the shell. I am not aware just what the composition of the shell is or what part this liner plays in it.

They gave us a blueprint which was very simple and self-explanatory, as to just what it was. It was called the liner for the 105 mm shell; I assume it holds the powder in the shell.

Q. I see. How many did they want when they first contacted you?

A. There was possibly two million—I have forgotten [96] exactly what the exact figure of the 75 mm shell was. And approximately half a million of the 105 mm shells.

Q. When was it they contacted you?

A. Prior to the 18th of December, 1951.

Q. That contact was by letter?

A. The initial contact to me was by letter. I then called on them.

Q. Do you have that letter with you?

A. No, I have not.

Q. Is it part of your files?

A. I don't know whether I saved it or not. It wasn't an important letter.

Q. But you believe that the quantity was around two and a half million of the total amount?

A. I am not sure. It may have been 1,700,000 of

(Testimony of Leonard J. Mills.)

the 75 mm shells. It was approximately 469,000, if my figure is correct, of the 105 mm shell, which was the portion that was awarded to me. I think that is the correct figure on the 105 mm shell.

Q. You don't recall what the other amount was?

A. It may have been 1,700,000, to the best of my recollection.

Q. The time of your first contact with Deering-Milliken Los Angeles sales office, Mr. Mills, what were you thinking of, the total of the liners or just the 105 mm? [97]

A. The total amount of the liners.

Q. Had you at that time had any discussions with the Government, other than this letter to you regarding that production?

A. I am not quite sure I understand your question.

Q. Well, I am not quite sure it was an understandable question. Prior to the time you came to Deering-Milliken, had you had any conferences regarding the production of these 105 mm and 75 mm liners with the United States Government officials?

A. Yes.

Q. Where were those?

A. At the Pasadena Ordnance Office.

Q. I see. And had you had any discussions with them at that time, that is, prior to the first time you came to Deering-Milliken, with respect to the quantity of cloth you would need to fill that total order?

(Testimony of Leonard J. Mills.)

A. No. That was something that we figured out, what would be required.

Q. Had you, prior to the time you first came to Deering-Milliken, figured out the total amount of cloth you would need? A. Yes, we did.

Q. How much cloth did you figure you would need?

A. Approximately a half-million yards. [98]

Q. How did you come to that figure?

A. Very simple. Both liners are the same except for the size. The body of the liner consists of a rectangular piece of cloth. I have forgotten the dimensions. If I had the blueprint I could refresh my memory as to what it was.

Those pieces are cut from, easily cut from the length of cloth as you spread it on the table. The layout of that particular piece would be laid out in such a fashion—that was why we consulted different widths and consulted on different widths to figure the most economical width to use, so there would be little waste as possible.

We may have one or two widths this way or a width that way, or straight up and down in another width (indicating).

There may be enough pieces left at the top to put through the clicking machine, where the circular piece would be cut out. There was no difficulty in figuring out how much material was required.

Q. You had done all of this figuring out before you first came to Deering-Milliken?

(Testimony of Leonard J. Mills.)

A. I had an engineer with me consulting on the cost and the figuring, also.

Q. That was prior to the time you first came to Deering-Milliken?

A. It was at the time I first came to Deering-Milliken. In other words, about that same time.

Q. Do you recall what quantity of cloth you asked Deering-Milliken for and in what widths?

A. I asked them for varying quantities in different widths, depending on which width I was considering at the first time.

Q. I mean your first contract, Mr. Mills.

A. I don't recall which width it was, offhand.

Q. Do you have any recollection inquiring with respect to 55-inch width? A. I possibly did.

Q. Do you have any recollection inquiring with respect to 39-inch width? A. I possibly did.

Q. If you had inquired with respect to 55 and 39-inch widths, those would have been the widths that would have, from your decision and your engineer's, been the best to cut to determine the most you could get out of the cloth, is that right?

A. No. Our inquiry only brought forth a price which, in turn, would determine the cost of the fabric. The total cost of the fabric is the number of units you would get out of that width, which would determine whether it was the economical width to use.

Q. That is what I am merely saying, was that your inquiry was for a specific width, which was

(Testimony of Leonard J. Mills.)

the width you had [100] figured out was the most economical to use, is that right?

A. Yes, but my inquiry didn't mean I had decided that was the width. I first had to find out the price and cost of that width, before I decided whether that was an economical width.

Q. That is very difficult for me to follow. Let me see if I do understand it. You have to know what the price of a piece of cloth is before you can determine whether or not you can economically cut more specific sized items out of that piece of cloth?

A. You can cut a certain number of items, units, out of a particular width of cloth.

Q. Yes.

A. The price of that cloth will determine how much those units are going to cost.

Q. Surely.

A. If a narrow width is a certain price and you can only get so many units out of it, it may be more economical to go to the wider width, which would give you a larger portion at a larger price, but the relationship may not make it economical to use the wider width or that particular width.

We found that there were—after several, playing around with several different widths we finally came down to the two widths which we asked for, before the final change on widths. [101]

I am sorry if it is confusing, the way I am putting it.

Q. What you are saying is you finally came down to the two widths which you contracted for

(Testimony of Leonard J. Mills.)

by the March 6th letter, but that is not what you contracted for on March 14th.

A. It finally came down to the two widths I contracted for in either March 6th letters.

Q. That isn't what you wanted eventually?

Mr. Lincoff: Objected to, if your Honor please. I think that is improper cross examination, to ask the witness to specifically limit his answer to what the question calls for. I believe he should be cautioned he would have a right to explain whatever answer he gives——

Mr. Lydick: Surely.

Mr. Lincoff: ——if it is one that calls for an explanation.

Mr. Lydick: I am sure he understands he can explain. I want an answer to my question first.

The Court: Just answer the question. Then if you feel that the short form of answer that is called for in the question is unintelligible without explanation, you may explain it.

The Witness: Will you repeat the question, please?

(The question was read.)

The Witness: No, it isn't. But the reason for the final change was that I felt it would be more efficient, [102] instead of getting these partial shipments every two weeks, of a portion of one width and a portion of another width, to take it all in one width, even though there was a small difference in cost to me.

So I asked Mr. Piersol at the time if it could be

(Testimony of Leonard J. Mills.)

all in one of the two widths originally contracted for, and he said yes, it was perfectly all right.

Q. (By Mr. Lydick): Now, was this contract with the Government, was there to be what is known as a bid contract or some other kind? Were you bidding on it with other people?

A. No. This was a negotiated contract.

Q. Will you explain what that means?

A. A negotiated contract is a form of contract where the Government doesn't call for a sealed bid necessarily. They will sit down and negotiate with you and discuss your costs, and other factors of the contract, and arrive at a decision as to whether you are to have the contract, in other words. It is not like a sealed bid in the sense of a sealed bid would interpret.

In other words, your bid is in, the envelopes are opened and you have no chance to change. Here it was negotiated.

I received the contract on one price. I went back to them at that time—it was not for the entire amount—and said I should have a higher price because it was only for a small portion. They gave me a 10 per cent increase. That is [103] what a negotiated contract is.

Q. When did you receive your first contract?

A. The first notice that I was to be considered for the contract was on February 6th, approximately.

Q. Do you have that notice with you?

(Testimony of Leonard J. Mills.)

A. I got it by phone. I was told, and I immediately passed the information on to Mr. Piersol.

Q. For the larger quantity?

A. No, that was for the small quantity. That was for the four hundred sixty some odd thousand units of the 105 mm shells.

Q. You say you had a previous contract to that, that called for a different price?

A. No. We were originally negotiating and I was figuring my cost on the entire quantity of both the 75 mm and the 105 mm.

They then advised me they would give me the 105 mm. I advised Mr. Piersol of that. At the same time I kept on negotiating with the Government and got a 10 per cent increase in my original price for that, for just the 105 mm shell.

Q. You mean the original price you had been negotiating about? A. That is right.

Q. You hadn't had a previous contract?

A. No, it was a price—— [104]

Q. You had just been negotiating about one price and now you were negotiating about a smaller amount. You negotiated and got a higher price, is that right? A. That is correct.

Q. There wasn't a first contract and then a second contract? A. No, sir.

Q. The only contract you ever had with the Government is the one dated March 14th, is that right? A. That is correct.

Q. As long as we are on that particular con-

(Testimony of Leonard J. Mills.)

tract, when did you say, again, you executed that contract?

A. Immediately upon receipt—you mean by that the final contract?

Q. Signed.

A. Immediately upon the receipt of it, which was approximately the 12th of March.

Q. I recall your testimony that you received three copies of that contract and had not yet been signed by the Government, and you signed it and returned it to them, and they signed it and then sent you a copy?

A. I believe it was signed by the Government when I received it.

Q. You say it was signed by the Government when you got it? [105]

A. I believe so. The letter of transmittal seemed to imply it was.

Q. I see. That is the only reason you believe that, is from the letter of transmittal?

A. To the best of my recollection. I can't recall, other than the fact the letter of transmittal speaks of it as signed contracts.

Q. It wouldn't surprise you at all to find out, however, that the Government insisted that the civilian sign the contract and then mail it back to them, that what they meant in that covering letter by "triplicate" was this was just the third copy they were sending you? A. Well,—

Mr. Lincoff: Just a moment. I object to that, if your Honor please, on the ground the question is

(Testimony of Leonard J. Mills.)

argumentative and assumes facts not in evidence; incompetent, irrelevant and immaterial.

The Court: Sustained. It doesn't make any difference if he was surprised by a particular development or not.

Are you contending there was not such a contract?

Mr. Lydick: No, I am not contending there wasn't such a contract. I am contending that Mr. Mills' recollection of the circumstances under which it was signed are nearly diametrically opposed to those of the persons at the Pasadena Ordnance Department. [106]

I am trying to find out if he thinks he signed it first or they signed it first. I think his recollection on the signing of this contract is important, because if his recollection is faulty about the signing of the contract, it may be faulty as to other things.

The Court: Then you may explore into that and treat the ruling as a ruling upon the particular question which was asked.

Mr. Lydick: Yes, your Honor.

Q. (By Mr. Lydick): Do you think the Government signed the contract before they sent it to you? A. At this point I am not sure.

Q. What did the contract call for you to provide?

Mr. Lincoff: Objected to, if your Honor please, on the ground that the document is the best evidence and speaks for itself.

(Testimony of Leonard J. Mills.)

Mr. Lydick: I have no objection to his looking at the document.

Mr. Lincoff: I think the document being in evidence can be read. In the absence of the best evidence it could be explained, but otherwise you are asking for hearsay.

The Court: You are urging the best evidence rule?

Mr. Lincoff: I am urging the best evidence rule, yes.

The Court: Sustained.

Q. (By Mr. Lydick): You do recall at the time of the [107] contract of March 14th—did you read it before you signed it? A. Yes.

Q. All the terms of it?

A. I believe so.

Q. I notice in your Complaint you include a prayer for 2 per cent over and above the amount of the contract itself on the theory that the contract provides that you may produce 2 per cent more or less than the specific amount, is that correct? A. That is correct.

Q. Had you intended to produce 2 per cent more? A. If at all possible, yes.

Q. You did? A. Yes.

The Court: Whether you would be able to do so would be dependent upon many variable factors.

The Witness: Yes; I could explain that if you wish.

The Court: Do so.

The Witness: All right, sir. The Government

(Testimony of Leonard J. Mills.)

allows you 2 per cent more or less for this reason: You order a quantity of goods. When you get this goods there is a certain percentage in the contract with your supplier which allows them for imperfections and such that you can't use.

If you order just the exact amount of goods you need for the contract you may suddenly find you haven't got enough [108] goods to complete the contract. Therefore, the Government allows you to order more goods than you figure you will need, so that any imperfections there may be, any loss of cloth there may be, would reduce you to some point, but not make it impossible for you to at least supply the minimum quantity the Government would want.

So they give you 2 per cent plus or minus. When we figured the amount of yardage we wanted for the units we figured 2 per cent plus.

We ordered sufficient goods to cover the maximum, so that if there was a certain amount of imperfection we weren't able to use, we felt there would be very little of it we couldn't use, because of the fact we would use the waste pieces wherever possible for the clicking machine, for the circular parts. We would then have something less than that 2 per cent maximum, but it would be as small as possible. I hope I made myself clear.

The Court: Well, you mentioned one variable factor which comes down, as I understand it, to a recognition that performance should be deemed within limits. If it is used up, then the nearest prac-

(Testimony of Leonard J. Mills.)

licable amount of material which the manufacturer would have to acquire in order to process.

Q. (By Mr. Lydick): Well, to get back to my question before the explanation. I believe your answer was that you did deliberately intend to produce 2 per cent over the total [109] amount if you could. You ordered material with it in mind, to produce 2 per cent over the amount ordered?

A. Yes.

Q. Did you read the contract terms with respect to variation in quantity? A. Yes.

Q. Do you have any objection if I read it, and if you want to explain anything you can.

“Variation in Quantity: Variations in quantity plus or minus 2 per cent will be accepted by the Government, subject to the provisions of General Provision 4 hereof, entitled ‘Variation in Quantity.’”

Provision 4 reads: “Variation in Quantity. No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.”

Would you say that conditions had been caused by manufacturing processes or variations in loading, packing, et cetera, if in fact you had deliberately ordered enough goods so you could produce the extra 2 per cent?

A. Yes, sir. Because in order to make sure, to

(Testimony of Leonard J. Mills.)

insure the delivery of the minimum quantity, I ordered sufficient [110] goods to cover the maximum number so that if there were that much imperfection, which would reduce my quantity, it wouldn't reduce or there would be less chance of reducing it below the minimum. That is the point.

Q. Were those part of your negotiations with the Government, that you should do that?

A. That is right. They were willing to accept——

Q. Those computations were worked out very carefully? A. Yes.

Q. Do you have your computation papers with you?

A. I believe that Mr. Lydick has them.

Mr. Lydick: If I do——

Mr. Lincoff: You mean Mr. Lincoff.

The Witness: I am sorry. Mr. Lincoff.

Mr. Lincoff: I have here, Mr. Lydick,—I am sorry.

Mr. Lydick: Do you have the papers he used in computing these things with the Government?

The Court: Do you think you might wish to predicate some questions upon the contents of those papers? We have been now almost an hour and a half. We will take a short recess. When you are ready to resume, give the clerk a signal.

(Short recess taken.)

The Court: Counsel, with regard to Monday, you wanted to know what the prospects were here and whether you should count on regular court hours.

We have two or three things on at 10:00 o'clock

(Testimony of Leonard J. Mills.)

that have been continued from week to week, and it was the assurance of counsel they were working them out and we wouldn't have to pass on the issue.

However, I read up on them and we do have to pass on them. They are the sort of thing that would take me 20 minutes, since each one of the three has been with us for a long time, going over from week to week, and last Monday I didn't have more than 10 minutes law and motion work. And I am assuming that we can start out with only taking enough time to either continue them again or approve the adjustments counsel have made.

We have at 11:00 o'clock a matter which, if it were to be presented, would take an hour. But I understand from the attorneys for both parties neither one is ready. So I assume we won't have to take a break at 11:00 for that.

At 2:00 o'clock, Mr. Clerk, you haven't heard about this, Laskowitz vs. Marie-Designer—that is a pretrial—and that pretrial will take a couple of hours. Mr. Mason just called to say he can't be here and we will put it over a week. And it is so ordered.

However, it will be at 3:00 instead of at 2:00 because we have something else at 2:00.

Now, you see what the prospects are for Monday. You might get held up for a few minutes. If so, the likelihood [112] is we can get in a full day.

Mr. Lydick: Would the court suggest we be here at 9:45?

The Court: I suggest you be here at 10:00.

Mr. Lydick: At 10:00 o'clock?

(Testimony of Leonard J. Mills.)

The Court: Yes.

Mr. Lydick: Thank you, sir.

The Court: I hope the court will have had a good night and get here by 10:00 o'clock, too. When you have to spend 12 hours in bed, if you happen to go to a movie or something on Sunday night you don't get up in time to get here promptly at 10:00.

Mr. Lydick: I knew the court's hours, your Honor, but I just heard you were extending them.

The Court: I extend them during the day after I get here. In view of doing that I have to have a certain number of inactive hours. Sometimes you don't feel like going to bed right at 7:30, so it holds you up a little in the morning. You will just have to bear with the infirmities of those——

Mr. Lydick: I assure you there is no objection to a short working day in the court. I will go ahead, if your Honor please.

We were discussing whether or not any of the figures were available that had been used in negotiating the contract with the Government. During the recess it was pointed out to me there were some figures available, but that those were some compilations which had been made perhaps, well, at least since the difficulty between Deering-Milliken and Modern-Aire, or at least since the filing of the action.

Q. (By Mr. Lydick): Do you have any papers or documents of any sort by which you submitted your cost figures to the Government and worked with them on? Any of your cost figures or papers you worked with at that time?

(Testimony of Leonard J. Mills.)

A. The papers I submitted to the Government, they are in the government files. I don't know of any supplemental papers to those that I can lay my hands on.

Q. You have none of your own work sheets or anything like that which you used in making up those papers?

A. No, other than the sheets which I showed you.

Q. That has been made up since your difficulties with Deering-Milliken? A. Yes.

Q. The item that was to be manufactured by you—first, I take it your negotiations then covered a period of approximately from the middle of December to the middle of March, is that correct, about three months?

A. The Government gave me the—on December 18th, gave me the proposal to figure on. I submitted those figures on, I believe, January 21st.

I received word that the figures on the 105 mm shell would be accepted on approximately February 6th. The negotiations [114] ran from that point on.

Q. In other words, from about December 18th to March 14th, around March 14 when you signed the contract, about three months?

A. That is correct.

Q. The item to be manufactured at all times was to be from rayon cloth, is that correct?

A. That is correct.

Q. And you did receive some specifications and blueprints from the Government?

(Testimony of Leonard J. Mills.)

A. That is right.

Q. When did you receive those?

A. Oh, approximately the 18th of December.

Q. Did you review them at that time?

A. The specifications and the blueprints?

Q. Yes. A. Yes.

Q. Did you understand them?

A. As much as necessary, yes, sir.

Q. Taking them one by one, did you understand PA-PD-29?

A. In that I understood—yes, I understood they were the specifications with which I had to order from the supplier.

Q. Did you review them?

A. Only to reading them over. [115]

Q. You did read them over?

A. Yes, I did.

Q. Was there anything in there that seemed unfamiliar to you at all?

Q. Yes, there were a number of things that were unfamiliar.

Q. Did you seek any advice with respect to those unfamiliar things? A. No, I did not.

Q. Did this engineer working with you go over them with you? A. Yes.

Q. Did he understand that?

A. If he did I did not know of that. It was of no concern of ours. Those were specifications we were to use in ordering the fabric. We would order the fabric as per Specification PA-PD-29, which is the common procedure in government contracts.

(Testimony of Leonard J. Mills.)

Q. I understand that is your position. I am merely trying to find out whether you or anyone in your employ at any time ever attempted to work out or learn any of the matters in PA-PD-29 which you may not have understood yourself.

A. No.

Q. You never did? A. No. [116]

Q. Did you study the blueprints?

A. Yes.

Q. Did you understand those? A. Yes.

Q. You worked those all out?

A. Yes, I did.

Q. How about any other specifications, were there any other specifications that were handed to you with respect to this contract?

A. No other specifications that were handed to me. I did secure other specifications on the threads, for example, which when I ordered the threads and got prices on threads, I ordered them as per specification.

I didn't have to cite anything about the specification. I mean the thread people know just what I was talking about, the terminology of the thread.

Q. Do you have the thread specifications with you? A. No, I do not.

Q. You don't have them in your possession?

A. I am not sure. I am not sure whether I still have them; they are common specifications.

Q. How about the packing specifications?

A. Yes, sir.

Q. Did you review those?

(Testimony of Leonard J. Mills.)

A. Yes, sir, I did. [117]

Q. Do you have those with you?

A. No, I have not.

Q. Did you completely understand those?

A. Yes, they were very simple.

Q. But you don't have them?

A. No, I do not.

Q. How does it happen you kept the specifications for the cloth but not for the thread and for the packaging?

A. Because that is the subject of some dispute here.

Q. The rest of your files you destroyed?

A. I did not destroy them, no.

Q. Did you ever have these specifications for the thread and packaging?

A. Yes, I did. I may still have them. If I haven't got them, I could secure them in very short order. They are common things. You could pick them up most any place in any thread house.

Q. Your counsel and I had a mutual understanding that all papers we had in our files and all papers which you had in your files would be available to you.

A. I would be glad to supply those specifications.

Q. No, I want to just know if you have those in your file.

A. To speak the honest truth I would be guessing, to say they are there, because I don't have any further use for [118] them.

(Testimony of Leonard J. Mills.)

Q. Do you have all your files?

A. I believe that we may need——

Q. Do you have files other than these here?

A. Yes, I do have files other than these.

Q. Regarding this matter?

A. I don't know of anything that we may need here.

Q. It is difficult for you to tell what I might need, that is true. A. I am sorry, sir.

Q. Do you have any other files, any other papers, documents of any kind or nature whatsoever, other than those here in court today?

A. I do not know.

Q. You do not know?

The Court: You mean you sized up your case and brought what you thought you needed?

The Witness: That is right.

The Court: You didn't explore to see what things you felt in your own mind might not be necessary to your case were in the group of papers brought to court?

The Witness: I did not destroy anything. I do not know of anything I left out. I did leave out the specifications on the thread, your Honor. I did not think there would be any question on that. I left out the specifications on packing [119] because I didn't think there would be any question on that.

The Court: Do you know where to look to obtain them in a short period of time?

The Witness: Yes, I do.

The Court: Do you wish him to bring them in?

(Testimony of Leonard J. Mills.)

Mr. Lydick: Monday, please. Any other papers or documents, such as working sheets that you may have used in negotiating with the Government, I would appreciate your trying to locate them.

The Witness: Yes.

The Court: Bring them with you when you come Monday. If you wish to go to other subjects, you may reserve the further cross examination on those subjects until he has had an opportunity to look them up.

Mr. Lincoff: May I address the court in response to the statement that Mr. Lydick had made that we did have such an agreement? I have all the files that were turned over to me by counsel. They are and have been ready and available for Mr. Lydick at any time he wishes to see them.

Mr. Lydick: I fully understand.

The Court: No one has suggested any absence of good faith.

Mr. Lydick: Absolutely not.

The Witness: Your Honor, since the blueprints are here [120] in court as evidence, the specifications on the thread and the blueprints, I would have to get the specifications from them, if I may.

Q. (By Mr. Lydick): You understand I don't want you to go out and get me the thread specification from some outside source, or the packing specification from an outside source.

I just want you to bring your files into court, to see if they are there, or if for some reason you don't have them any more.

(Testimony of Leonard J. Mills.)

A. I don't think I have the specifications on the thread or packing.

Q. Once we determine you don't have those I can go ahead and ask you about those.

A. I can safely say I don't have the specifications on the thread and packing.

Q. Why did you not keep those but kept the cloth specifications?

A. Because the specifications on the thread and packing were of no importance, in my opinion, in this matter.

Q. Because they didn't involve a lawsuit, you mean?

A. That is right, sir.

Q. About this specification with respect to stitching seams and stitches, do you have those?

A. No, I do not.

Q. Did you read those when you got them? [121]

A. Yes.

Q. Did you understand those?

A. Yes, I did.

Q. When did you first learn you would have to have a pilot lot of these cartridge liners?

A. Sometime between the 10th of March—after the 6th of March, I will safely say, and the 20th, 21st of March.

The Court: Did you use the expression "pilot lot"?

Mr. Lydick: Yet, pilot lot.

The Court: P-i-l-o-t?

Mr. Lydick: A sample lot, as you might—

(Testimony of Leonard J. Mills.)

The Court: You might have it defined by the witness.

Q. (By Mr. Lydick): Will you explain what a pilot lot is?

A. Yes, sir. The Government—Colonel Heath, in particular, of the Ordnance Department called upon me, after I was advised that the contract was confirmed, that the Government was giving me the contract, and advised me that they would require a pilot lot of a hundred units of this particular liner, which would—they wished to send back to Joliet for an analysis and such. It was a routine matter, as he explained it; that was what was meant by a pilot lot.

Q. This was sometime after March 16th and before March 20th? A. March 6th.

Q. March 6th, I mean, and March 20th when you first [122] learned you would need a pilot lot?

A. It was between March 6th and March 10th he first required it.

Q. What arrangement did you make for the production of that pilot lot?

A. I called Mr. Piersol and asked him if he could supply me with approximately 50 yards of the rayon fabric we contracted for.

Q. That is, to get the fabric?

A. That is correct.

Q. What other arrangements did you make?

A. The thread was available. That was the only arrangements that were necessary.

Q. Did you hire any employees to make them?

(Testimony of Leonard J. Mills.)

A. No, no. We could have picked an operator in no time at all, when the fabric arrived, and could have made the whole thing in an hour or two.

Q. You could have made the hundred in an hour or two?

A. Approximately. Maybe three hours or so. Considerably less than the entire day.

Q. With one operator? A. That is right.

Q. Had you ever made any of them?

A. I never received the fabric, sir.

Q. Had you ever made any of these inner liners at any [123] time?

A. No, sir, I did not.

Q. Mr. Mills, when was your first contact with any representative of Deering-Milliken?

A. Approximately the 18th of December.

Q. Who was that that you contacted?

A. I called Deering-Milliken on the phone and the party answered, introduced himself as Mr. Piersol.

Q. What did you say to him?

A. I told him that the Ordnance Department was interested in having me, and I was figuring——

Q. Speak up a little, please.

A. Yes. I told him that I was figuring for the Ordnance Department in Pasadena on the cost for making liners for 105 mm shells, which required a rayon cartridge cloth.

Q. When you said you were figuring, did you represent to him you were from the Ordnance Department? A. No.

(Testimony of Leonard J. Mills.)

Q. Did you tell him who you were?

A. Yes. I introduced myself as Mr. Mills of Modern-Aire of Hollywood. I asked him for quotations on rayon cloth per Specification PA-PD-29.

Q. Is that all?

A. No. I mentioned to him several widths I could use.

Q. Do you recall those widths? [124]

A. No, I don't at the moment.

Q. Is that all?

A. He said he would inquire of New York.

Q. Is that all you said?

A. I believe that is all I said.

Q. What did he say?

A. He would inquire of New York, get the quotations on those, on that price. I did ask him, read to him the specifications, the requirements in the Specification PA-PD-29.

Q. You did?

A. Yes, I did. And he advised me that New York had the specifications and that they would know just what it was.

Q. But you did read them to him?

A. Yes, I mentioned to him, I read the various terms there, the various requirements in the specifications.

Mr. Lydick: May I approach the witness, your Honor.

The Court: Yes.

Q. (By Mr. Lydick): Would you mind reading

(Testimony of Leonard J. Mills.)

from that what you read to Mr. Piersol (indicating)?

A. Paragraph 3. "Requirements. 3.1 Material.—Rayon cartridge cloth shall be woven from viscose rayon yarn containing no acetyl groups and not more than 0.2 per cent of sulphur.

"3.2 Color.—Unbleached, natural or bleached white. [125]

"3.3 Appearance.—Uniform and free from visible imperfections.

"3.4 Widths.—As specified by the contract, minimum 36 inches.

"3.5 Weight.—5.00 to 5.75 ounces per square yard.

"3.6 Breaking Strength.—Warp direction, minimum 70 pounds, maximum 140 pounds. Fill direction, minimum 70 pounds, maximum 140 pounds.

"3.7 Ether Extract.—Maximum, 1.0 per cent.

"3.8 Acidity or Alkalinity.—Mineral, none. Organic, maximum 0.10 per cent."

Q. May I interrupt just one second?

A. Yes.

Q. These are the things you read to Mr. Piersol over the telephone?

A. That is correct.

Q. This first day?

A. That is correct.

The Court: May I ask a question? Did you tell him the substance of what you have just read, or did you read it word for word?

The Witness: No, sir. The way I read it to him, in order for him to know just what to inquire for, I said, "It is as per Specification PA-PD-29." I

(Testimony of Leonard J. Mills.)

said, "The requirements in [126] there mention the material, the color."

I don't think that I read them as thoroughly as this, because he said it wasn't necessary to, they knew exactly what it was back there.

I did mention the fact that the color could be unbleached, natural or bleached white.

Q. (By Mr. Lydick): Then you don't believe you read all of these things you just read?

A. I read as much of it as he was interested in hearing. He said they had the information back in New York.

Q. What do you remember now?

The Court: Let's try something here. We will see how skillful you are. Just suppose you were a phonograph record, taking down a recording, and the cutting needle was in now and you are going to tell us what he said, when he said to you, "We have that information here," or whatever it was he said that caused you to stop reading the specification.

The Witness: Sir, I didn't say I stopped reading. I am sorry, your Honor. I said——

The Court: Well, just be a phonograph now and say, "I said" and "he said," and tell us as near as you can what you said and what he said so we will hear it as if we had been there eavesdropping.

The Witness: All right, your Honor. I will try to do that. I said, "Mr. Piersol, I would like to get quotations [127] on rayon cartridge cloth as per Specification PA-PD-29 and also PXS-1300." The

(Testimony of Leonard J. Mills.)

requirements of both specifications are identical right down the list there.

I said, "I would like to point out to you certain things in there." I said, "The material is rayon cartridge cloth and woven from viscose yarn. The color can be either unbleached, natural or bleached white. The appearance is uniform and free from visible imperfections. The width is as specified by the contract."

Q. (By Mr. Lydick): Maybe Mr. Piersol could get that. I didn't.

A. He may not. I skipped over a lot of this, which he said——

Q. When he interrupted you to tell you to skip over something, will you tell us what that was?

A. It is difficult for me to recall just what the emphasis——

The Court: We are not giving you an easy question.

The Witness: I know, sir.

The Court: I don't expect that you will try to handle it as if you thought we thought it was an easy question. You just sit there and take your time with it.

We all have to realize that the first illustration I gave you of the phonograph record is an impossibility here. You are not a phonograph record. The human memory doesn't work [128] that way.

You just give it as near as you can and take your time. We will not rush you. We will get as near an approach to the ultimate desirable by your con-

(Testimony of Leonard J. Mills.)

centrating on it and giving us your best answer, and not trying to speed up on it.

The Witness: All right, your Honor. I believe this is the way it went: I read, "Material.—Rayon cartridge cloth shall be woven from viscose rayon yarn containing no acetyl groups and not more than 0.2 per cent of sulphur. Color.—"

Q. (By Mr. Lydick): Just a second. Are you sure you read that to Mr. Piersol?

A. I believe I read that first one to him, yes.

"Color.—Unbleached, natural or bleached white." I am positive I read that to him.

I am not sure—I don't think I read the appearance or the width. The weight I did emphasize to him is to be 5 to 5¾ ounces per square yard. That was definitely mentioned.

I mentioned the warp and fill to have a minimum of 70 pounds and maximum of 140 pounds of breaking strength.

I don't think I mentioned anything else. That was just about, possibly that was all I did mention.

Q. Did you by any chance——

The Court: Could you tell by his break-ins, of what he said and at what point, about when, and all that, or whatever it was he did say—— [129]

The Witness: I asked him whether New York would want a copy of these specifications, and he said no two or three times. He repeated that and said no, they had the specifications in New York. That they did several millions of dollars worth of business with the Government and they were fully

(Testimony of Leonard J. Mills.)

aware of what these specifications are and could get them when they wanted them.

Q. (By Mr. Lydick): So then he didn't interrupt you at all while you were reading from the specifications, it was only when you asked him if he wanted a copy of them?

A. I mentioned the material once, which pertained to the physical points, that I felt he should know. For example, the weight being 5 to 5 $\frac{3}{4}$ ounces.

Q. The ones you felt were material.

A. Yes, I mentioned those.

Q. Did you happen to read to him Specification 3.11?

A. No, I did not. I don't believe I did.

Q. Do you mind reading it to the court?

A. "Workmanship.—The finished cloth shall be uniformly and closely woven and shall be free from weighting materials. A plain single weave is satisfactory, but other weaves may be employed."

Q. You read that yourself?

A. I read the entire thing myself.

Q. What did "finished cloth" mean to you?

A. I didn't draw a conclusion from it.

Q. What did "free from weighting materials" mean to you?

A. I don't know what that means.

Q. I see. But you did make a reference to the unbleached and natural, and you did make a reference to the weight, is that correct?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Did you tell him what width you wanted a quotation on?

A. Yes. I asked for several widths.

Q. You don't recall what those were?

A. Not at that particular moment. There was 39 inches for one, I believe, and what else there was I don't recall.

Q. Do you happen to recollect how much you wanted, the quantity?

A. Yes. Each width—no, at that time we spoke of a half a million yards, approximately. I asked him for prices in the various widths.

Q. You think it was a half a million yards or something approximately like that?

A. That is right.

Q. No specific lengths?

A. No specific lengths. I asked prices for the various widths, so I could determine what widths I could use.

Q. You are sure of that? [131]

A. That is correct.

Q. Did Mr. Piersol give you a quotation right away over the telephone? A. No.

Q. What did he say?

A. He said he would consult New York and inquire of New York as to a quotation.

Q. Did he say anything more about why he was doing to consult New York?

A. Other than the fact he had to get a price from the mill.

Q. I see. You understood he was going to con-

(Testimony of Leonard J. Mills.)

sult New York because he had to get a price from the mill? A. That is correct.

Q. Had you had any previous dealings with Deering-Milliken?

A. Nothing that I—I believe I inquired of them previously on prices on various nylon cloths in my parachutes and such.

Q. What did you know about Deering-Milliken, if anything?

A. Only they were a very large national concern, one of the biggest.

Q. Did you understand——

A. One of the biggest. [132]

Q. Did you have any knowledge what position they occupied in the industry with respect to selling? A. A leading position.

Q. Did you understand whether or not they—did you have any impressions as to whether they manufactured cloth themselves or only acted as sales agents?

A. I don't believe that I understood what their inner setup was. No, I do not.

Q. Had you inquired of anyone?

A. No, I did not think it necessary.

Q. You know a man by the name of Eddie Katz?

A. Yes, I do.

Q. Did you ever discuss Deering-Milliken with him?

A. Yes. I believe Mr. Katz was interested with me for a short time in parachutes.

(Testimony of Leonard J. Mills.)

Q. Did he ever tell you how Deering-Milliken worked? A. No, he did not.

Q. He never did?

A. He never mentioned it, other than——

Q. Did you make any inquiries from any other sources with respect to this company that you were intending to some day, you hoped, buy 500,000 yards of merchandise from? A. No, I did not.

Q. No other inquiries whatsoever?

A. None. [133]

Q. What did you believe Mr. Piersol's authority to be?

Mr. Lincoff: Objected to, if your Honor please. I think that calls for a conclusion, calls for an opinion. Certainly, it is incompetent, irrelevant and immaterial what his conclusion was.

The Court: Sustained.

Mr. Lydiek: I think, your Honor——

The Court: I will hear you on it. I was about to say, or I think I did say "sustained." If there is some reason why it shouldn't be, tell me.

Mr. Lydiek: I think it is quite important. As your Honor pointed out, there apparently is in this, at least it appeared from the opening statement, if not from the pleadings, there is apparently in this case some question of authority of the local sales agent to enter into a contract. And I think that it is necessary for us to determine whether anything Mr. Piersol said or anything Deering-Milliken said gave this gentleman the idea that Mr. Piersol had such authority.

(Testimony of Leonard J. Mills.)

I agree that perhaps I shouldn't ask for his opinion. Perhaps I should approach it a different way, but I think we must go into the subject.

The Court: I think the field of inquiry is proper, in light of what appears to be probable contentions here, although they are not too well defined as yet. But we should not start with a conclusion of the witness. [134]

Mr. Lydick: Certainly.

The Court: But rather with what led him to that.

Q. (By Mr. Lydick): Now then, Mr. Mills, as I understand your testimony, you had made no inquiries regarding Deering-Milliken's interfunctioning and operations of your own?

A. No, I did not.

Q. Did you inquire of Mr. Piersol as to what his authority was with respect to the making of quotations or the acceptance of orders?

A. I did not.

Q. Did he ever tell you anything with respect to his authority in that regard?

A. He told me at the time that I signed an order that I had a contract with the mill——

Q. No. Just answer my question, please. Did he ever tell you anything with respect to his authority?

A. No, not any more than just that.

Q. Did anyone from Deering-Milliken ever tell you anything with respect to his authority?

A. No.

Q. In your experience in dealing with Mr. Pier-

(Testimony of Leonard J. Mills.)

sol, did you find he referred all of your inquiries to New York before giving you any quotations?

A. That is correct.

Q. Every single instance that you can recall?

A. As far as I know, yes.

Q. Did that lead you to come to any conclusion?

A. That the price, whatever I was inquiring of, he had to get from New York as to what the market price was at the time.

Q. Now, I noticed that in some of the letters that were introduced by counsel while you were under direct examination that they were confirming telephone conversations.

A. That is correct.

Q. Did you request those letters or did Mr. Piersol send them voluntarily?

A. He sent them to me. I wanted to have them; whether I requested them of him or not I do not know.

Q. Do you think you might have requested him to send you the confirmations in writing?

A. Yes, I may have. If I did——

Q. Did you ever confirm any of your inquiries in writing?

A. Did I ever—there was nothing to confirm. You mean to confirm my inquiries in writing?

Q. Yes.

A. I am not sure I understand the question, counsel.

Q. Did you ever send Deering-Milliken, prior to the time you had difficulty with them on March

(Testimony of Leonard J. Mills.)

21st, any kind of a writing of any sort whatsoever? [136]

A. No. My inquiries were simply by telephone.

Q. When did you get a quotation from Deering-Milliken for the first time?

A. Sometime after the 18th of December.

Q. Well, is that the best you can fix it, Mr. Mills?

A. That is about the best I could fix it.

Q. You are not doing as well for me as you did for your counsel.

Mr. Lincoff: Your Honor please,—

Mr. Lydick: Pardon me.

Mr. Lincoff: —I respectfully submit that the witness' memory can be refreshed, if Mr. Lydick will show him the courtesy of showing him the letter for that purpose.

Mr. Lydick: He testified to these things not more than two hours ago, your Honor.

Mr. Lincoff: I submit that statement of counsel is prejudicial. Each of them were accompanying letters or some other document to which the witness referred—

Mr. Lydick: You are saying none of that testimony was by his own recollection, but only by reference to this correspondence?

Mr. Lincoff: I am not making any such statement. I think it is for the court to draw the inference. I think there is a law of evidence that has to do with refreshing one's recollection by a perfectly proper method. [137]

(Testimony of Leonard J. Mills.)

The Court: This is not the time to argue the case. I can see arguments both ways. The argument he testified from present recollection revived is that revived by review of the documents. Also the matter that I assume he has discussed this case at some length within an immediately recent time with his counsel, and looked for and had his attention directed to those elements of the transaction and those incidents which would be important from their standpoint, and has not had his memory jogged on those points that would be adverse to his position.

I don't mean that as being critical. I know when we used to go over things with witnesses we had in mind the preparation of our case, and hence you don't expect as great a refreshed recollection when a man is on cross examination as you do when he is testifying in support of his own position. Hence, cross examination is much more liberal and the opportunity to explore and the requests for instructions to bring in documents is quite common in cross examination.

So you proceed, counsel, and if you want him to bring anything in which he doesn't have here, just ask for it and we will see what we can do.

Mr. Lydick: Thank you, your Honor.

Q. (By Mr. Lydick): When did you get the quotation from Deering-Milliken for the first time?

A. It was sometime after the 18th of December, counsel. [138] I can't recall the exact date.

I can say this: Approximately the 18th of December I was requested to start figuring on those

(Testimony of Leonard J. Mills.)

liners. Immediately after that I inquired of several mills for quotations. At that time I contacted Deering-Milliken.

Q. Yes. I know you have testified as to when you first contacted Deering-Milliken. I am asking you when Deering-Milliken first gave you a quotation, Mr. Mills.

A. Well, a few days after I contacted Deering-Milliken Mr. Piersol called me and gave me a quotation and confirmed it by letter.

Q. You contacted them around December 18th, and it was a few days afterward?

A. A few days after I contacted them.

Q. Had it been as long as, oh, 28 days, 22 days?

A. No. I had definite prices before I submitted my cost to the Government, which was the 21st of January. So I don't think it could have been as long as that.

Q. Well, December 18th to January 10th is approximately 22 days. Could it have been that long?

A. I may have been that long.

Q. Well, was the first quotation you got from Deering-Milliken the telephone quotation you received that was confirmed by the letter of January 10th that Mr. Piersol wrote to you? [139]

A. That may have been the first quotation.

Q. If that were your testimony this morning, would that be your testimony this afternoon?

A. Yes.

Q. Was the quotation oral or in writing?

A. Mr. Piersol's quotation on the price?

(Testimony of Leonard J. Mills.)

Q. Yes.

A. It was oral, on the phone, confirmed by letter.

Q. Do you have any independent recollection whatsoever as to what he said?

A. Nothing other than what is in the letter.

Q. You have no independent recollection except from the letter?

A. That is correct.

Q. If I am not mistaken, that was Plaintiff's Exhibit 1, was it not? Now, you have that letter before you, Mr. Mills?

A. Yes, I have.

Q. Do you recall now whether or not you had any other conversations with Mr. Piersol with respect to any widths other than the 39-inch?

A. Prior to this letter?

Q. Yes.

A. I am not certain. I mean this letter leads me to believe that was the width I asked for at that time.

Q. No. This is confirming a telephone quotation of the [140] day before (indicating).

A. I say yes, but since——

Q. Your original inquiry had been for several widths, I think you testified.

A. I may have said that. This letter leads me to believe I inquired only for the 39-inch width. I don't recall what widths I asked for at that time. There were several widths being considered.

Q. You don't recall what widths you asked for in your first inquiry?

A. Yes.

Q. You are inclined to believe it was only one?

A. Since the quotation is on one.

(Testimony of Leonard J. Mills.)

Q. I believe the court has already asked you what your understanding of the word "greige" in that letter was. The sentence reads, "Confirming my telephone quotation to you, we quoted subject to previous sale Government Specification PA-PD-29 34 cents per linear yard in the greige, 39-inch wide for delivery," et cetera.

What did "in the greige" mean to you in that letter?

A. "In the greige" means unbleached, undyed, as it comes off the loom.

Q. Has that always been your understanding of what that meant? A. That is correct. [141]

Q. When you say "unbleached," or "undyed," you have reference strictly to color?

A. That is correct.

Q. In other words, the primary connotation of the expression "in the greige" is a color connotation?

A. It is as it comes off the loom.

Q. The color as it comes off the loom?

A. Well, yes, the color as it comes off the loom.

Q. That word or those words don't mean anything to you with respect to the condition of the goods?

A. No, other than it should be as per Specification PA-PD-29.

Q. Generally speaking, the word "greige" in the textile industry or your understanding of the word "greige," if you have one, has been strictly a color connotation, the natural, unbleached color as it

(Testimony of Leonard J. Mills.)

comes off the loom, but it has nothing to do with the condition as it comes off the loom.

A. I don't know anything about the technical aspects of it, so I couldn't quite know whether "greige" means anything technically as it comes off the loom.

Q. Having received this letter, did you make any inquiry as to what the word "greige" might mean?

A. No.

Q. Did you ask the engineer with whom you were working at that time? [142]

A. No, no. This letter was as per the specifications I required.

Q. I am not going to be argumentative with you, Mr. Mills. It says "in the greige" and I want to know whether that meant anything to you at all, other than just the color, the natural, unbleached, color of the cloth as it would come off the loom? It had no other meaning to you?

A. That is correct.

Q. Have you since had any reason to believe it had any other meaning or do you still think it means that?

A. I don't quite follow the question, counsel.

Q. My questions were directed to what you thought the words meant at the time you received this letter. I ask you if you still think the words mean just that.

A. As it comes off the loom, it means just that.

Q. The natural color as it comes off the loom?

A. And goods as it comes off the loom.

(Testimony of Leonard J. Mills.)

Q. You mean it may have some connotation other than a color connotation?

A. I am not that much of an expert in it, to know what you are driving at.

Q. I just want to know what you think the word "greige" means.

A. I understand that the term "greige" means as it comes off the loom. [143]

Q. As the cloth comes off the loom?

A. As the cloth comes off the loom.

Q. With no limitations or anything?

A. Well, I don't know where you want me to put limitations.

Q. When cloth comes off the loom, of course, it has several things about it. For example, it may have weighting materials, may it not?

A. I am not at all sure I understand. I have an idea what you might mean by "weighting materials." Technically, I am not sure I do.

Q. It might have dirt in it?

A. Yes, I suppose it could.

Q. It might have starches in it which they have used to strengthen the thread so it would go through the loom?

A. I don't know if they do use starches. I am not a millman. I never professed to be a millman.

Q. And it has a color when it comes off the loom, is that right?

A. The color of the yarn, yes.

Q. In other words, there is a color to the mate-

(Testimony of Leonard J. Mills.)

rial and there is a condition of the material, is that correct? A. That is right.

Q. Now, to you does the word "greige" mean both the color and the condition of the cloth as it comes off the loom [144] or just the color of the cloth as it comes off the loom?

A. To me "in the greige," as I understood it, is the goods as it comes off the loom. In other words, you might say——

Q. The color of the goods as it comes off the loom?

A. The color of the goods as it comes off the loom.

Q. And the condition of the goods as it comes off the loom?

A. And I guess the condition of the goods possibly as it comes off the loom. Meat, whether it is raw—meat is either raw or cooked. I can tell you when meat is raw and I can tell you when meat is cooked. What condition that meat may have when it is raw, other than it is raw, I don't know. I am not a butcher.

Q. You know it has a connotation then other than color? The word "greige" has a connotation other than color? It also refers to the condition of the goods as it comes off the loom?

The Witness: Your Honor, if I am suspicious it is only because I don't understand what the counsel is trying to get from me. I mean I am at a loss here——

The Court: He doesn't understand the legal

(Testimony of Leonard J. Mills.)

effect or doesn't understand the scope of inquiry, counsel. Suppose you try it in a little different phraseology.

Mr. Lydick: Well, a piece of cloth that comes off the loom. It isn't really necessary to try different phraseology. I am confident, insofar as the words I am using, that Mr. Mills [145] understands them.

The suspicion of me is only as to the possible legal effect those words might have. All I want to know is what his idea is of what "greige" goods mean.

Q. (By Mr. Lydick): You say "greige" goods are goods as they come off the loom?

A. That is correct.

Q. The only reason I am inquiring of you to any degree at all is I think at one time you told me, and if counsel insists I will find the date and page and read it to you, you thought "greige" goods simply referred to the color of the goods as they came off the loom.

Would you care to have me go into that or permit me to go ahead with the questioning and decide later?

As I understand it, you seem to feel now that "greige" goods has some meaning other than just the color of the goods as they come off the loom, but may refer to the condition of the goods as they come off the loom, is that possible?

A. No. I always interpreted "greige" to mean as it comes off the loom.

(Testimony of Leonard J. Mills.)

Q. And it is not limited to the color as it comes off the loom, but everything about the goods as it comes off the loom?

A. That I believe is correct.

Q. Well, we will come back to it with respect to what your [146] previous testimony has been. But you do understand now it is everything about the goods as they come off the loom?

A. That is correct.

Q. That is what it meant to you on January 10, 1952, when you received this letter confirming the quotation you had requested from Mr. Piersol?

A. On January 10, 1952, I understood that the fabric being quoted was——

Q. I know what you are going to say.

Mr. Lincoff: Then may I ask he be permitted to finish his answer?

Q. (By Mr. Lydick): My entire question has been with respect to the word "greige." I continue to ask for your understanding on January 10, 1952, for the meaning of the word "greige" in that letter.

Mr. Lincoff: May I ask the court to instruct counsel to permit the witness to finish his answer?

Mr. Lydick: I respectfully submit, if your Honor please, that the answer was not responsive to my question.

Mr. Lincoff: You might have moved to strike it.

The Court: Read the question.

Mr. Ludick: I will be happy to reframe it, if that is satisfactory.

(Testimony of Leonard J. Mills.)

The Court: I could hear him start and get another breath to answer sometimes here. [147]

Mr. Lydick: May I ask the question again?

The Court: And be shifted a little by a different phrasing of the question, so suppose we just start over again with that. However, it is 25 minutes to 5:00. The Clerk has some duties before their office closes. Is this a good time to break, or do you want to take a few minutes more?

Mr. Lydick: I would just like to get the answer to just that one question.

The Court: All right. Ask it again.

Q. (By Mr. Lydick): You have testified, Mr. Mills, the previous three or four answers as to your present understanding of the meaning of the words "greige goods." Was the answer that you gave to those immediate previous questions, was that understanding that you indicated there the same understanding that you had as to the meaning of the words "in the greige" in this letter of Jan. 10, 1952, and at the time you received that letter?

Mr. Lincoff: I object to the question on the ground it is compound, complex and completely unintelligible, your Honor.

Mr. Lydick: May the question be read?

(The question was read.)

The Court: Inasmuch as I don't think he fully answered each of the questions which have been put, you are proceeding now with a great deal of haste, but I don't know that it is too much haste, that would allow him to take a moment or two

(Testimony of Leonard J. Mills.)

[148] to think of the next thing to say, he was about to say, when another question has been put to him.

I don't know that the understanding has been sufficiently developed to act as a foundation for this type of question; hence, the objection is sustained.

Q. (By Mr. Lydick): Mr. Mills, when you received this letter from Mr. Piersol on January 10, 1952, what did you believe the words "in the greige" meant?

A. That the quotation was on the fabric that I required as per Specification PA-PD-29.

Q. May I ask the question again? What did you believe the words "in the greige" meant?

A. That they complied with the specifications.

Q. On January 10, 1952, Mr. Mills, irrespective of any quotation, irrespective of any inquiry you may have made, what did you think the words "in the greige" meant?

A. Goods as it came off the loom, unbleached, undyed.

The Court: Would it have had any other kind of processing?

The Witness: I don't know of any other processing that goods normally goes through. It means as it comes off the loom, sir.

That if there are any other processing that comes—that has to be done to the goods, I mean I am not aware of any other processing there is, other than the dyeing and bleaching. [149]

The Court: Would you consider "greige goods"

(Testimony of Leonard J. Mills.)

before it is inspected or would it be "greige goods" after it has been inspected, after it comes off the loom?

The Witness: I believe it would be "greige goods" before and after it was inspected.

The Court: It doesn't refer then to any quality of appraisal, but, rather, as to the mere physical aspect of those goods as they come off the loom?

The Witness: That is correct, sir.

The Court: That was your understanding on January 10, 1952, of the meaning of the words?

The Witness: That is correct.

Q. (By Mr. Lydick): You know of no other processing that is ever done to cloth after it comes off the loom, other than bleaching and dyeing?

A. No.

Q. Have you ever heard the expression "converting"? A. Yes, I have.

Q. Do you have any idea what it means?

A. I believe it is the converting of goods to some print cloth or fabric of that nature, or design of that nature.

Q. Have you ever heard the expression "finishing"? A. Yes, I have.

Q. What does that mean?

A. By "finishing" it means that they finish a process [150] that is required in the goods.

Mr. Lydick: We will return to the subject Monday, with your permission.

The Court: I don't mean to cut you off. If you

want to go a little further we will do it. If not, we will recess.

Mr. Lydick: I think it would be just as good to recess now and take up again Monday.

The Court: Is there anything you wish this witness to bring to court with him Monday?

Mr. Lydick: Any records or files with respect to his negotiations with the Government that he has, that are not presently here.

The Court: Concerning this particular contract?

Mr. Lydick: Concerning this particular contract.

The Witness: Your Honor, may I ask regarding the specifications of thread and packing, if you would like those I would have to secure them from a government office.

Mr. Lydick: I only want them if they are in your files. I want nothing you have to secure.

The Witness: I do not believe I have those any longer.

Mr. Lydick: Thank you, your Honor, for the time indulgence. I trust counsel will permit me to apologize. He asked me if I would agree with 4:15 recess. I said I certainly would. It is 20 minutes of 5:00.

The Court: You let us know any time you want to adjourn [151] at a particular time and we will try to meet the necessities of counsel in that regard. The recess now will be until 10:00 a.m. Monday.

(Whereupon, at 4:40 o'clock p.m., Friday, November 20, 1953, the hearing was adjourned until Monday, November 23, 1953, at 10:00 o'clock a.m.) [152]

Los Angeles, Monday, Nov. 23, 1953, 10:45 a.m.

The Court: All right, gentlemen.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): If my recollection serves me correctly, Mr. Mills, we were, at the close of the Friday session, discussing your understanding of the meaning of the term "greige," meaning greige goods. I will go forward from there.

I don't recollect whether I inquired or not, but I wonder if you recollect the definition of "greige goods" that you gave at the time of your deposition. Do you? A. No, I am not sure.

Mr. Lydick: I have not received a signed copy of the deposition, nor has Mr. Lincoff received a signed copy of Mr. Piersol's deposition.

I have discussions the corrections which Mr. Piersol wishes to make.

May I inquire, counsel, if there are any corrections that Mr. Mills wishes to make in his deposition on pages 91, 92 or 93? [155]

Mr. Lincoff: If your Honor please, there are no corrections on the original deposition of Leonard J. Mills on page 91. There are no corrections in the deposition of Leonard J. Mills on page 92, and on page 93 of the deposition of Leonard J. Mills, at

(Testimony of Leonard J. Mills.)

line 3 the word "neither" is changed to "either," and on line 4 the word "nor" is changed to "or."

Other than that, there are no changes on pages 91, 92 and 93 about which counsel for the defendant has made inquiry.

Q. (By Mr. Lydick): Mr. Mills, on the date of your deposition, which, if I am correct, was November 2, 1953, about three weeks ago, I asked you at page 91, line 8, of your recorded deposition:

"Q. Do you know what greige goods is?

"A. Greige goods in the term is goods that have not been dyed to any particular color."

And I continued on and said:

"Q. Greige goods are goods that have not been dyed to any particular color?

"A. That is right."

Is that still your definition of greige goods?

A. That is correct.

Q. Does the term, or did it on November 2nd have any other meaning to you?

A. Well, yes, greige goods is as it comes off the loom. It means it is undyed, to any color. [156]

Q. That is still your definition?

A. That is right.

Q. Mr. Mills, referring back to your testimony regarding your first conferences, or your first inquiries to Deering-Milliken and their response thereto, which I believe was contained in a letter of January 9, 1952, at that time did you know the meaning of the term "finished goods"?

A. I am not sure whether my meaning of the

(Testimony of Leonard J. Mills.)

term "finished goods" is correct and agrees with yours.

Q. I did ask you if you did know the meaning of it then.

A. I had no occasion to question myself as to what the meaning of "finished goods" was then.

Q. Are you testifying that at that time you did not know the meaning of "finished goods"?

A. I have an idea of what "finished goods" now in my opinion is.

Q. Did you have an idea then?

A. I had the same idea then, yes.

Q. What is that?

A. That finished goods is finished to the specification that it was meant for, that was sent up for it.

Q. In other words, the only knowledge you had of the term "finished goods" had relation with respect to finishing to some specification? [157]

A. That is right.

Q. Do you know what a finishing plant is or did you at that time? May I rephrase the question? Did you at that time know what a finishing plant was?

A. Not too well.

The Court: What was your idea of what a finishing plant was?

The Witness: As I say, I haven't got too good an idea what a finishing plant was.

Q. (By Mr. Lydick): Did you at that time know what a converter was?

A. My impression of a converter then, as now,

(Testimony of Leonard J. Mills.)

is one that converts goods from one state to another state.

Q. Do you mean by that that he owns or has facilities by which he does his converting?

A. I believe so.

Mr. Lydick: If the clerk please, may I have what I believe is Plaintiff's Exhibit 1 so I can show it again to the witness and permit him to refresh his memory therefrom, if necessary?

Mr. Clerk: Yes, sir.

Q. (By Mr. Lydick): So that the wording of that first letter which you received from Deering-Milliken may be clear, would you be good enough to read it? A. Yes. [158]

"Dear Mr. Mills:

"Confirming my telephone quotation to you, we quoted subject to previous sale Government Specification PA-PD-29 34 cents per linear yard in the greige, 39 inch wide for delivery March through August on terms of net 30 days f.o.b. Spartanberg, South Carolina.

"We shall hope to have a substantial order from you.

"Very truly yours,

"Deering-Milliken & Co., Inc.

"Lee Piersol, Regional Manager."

Q. Did you at that time think you had a contract with Deering-Milliken?

A. This is just a quotation to me of a price.

(Testimony of Leonard J. Mills.)

Q. Did you have any conversations with Mr. Piersol regarding the 55-inch width that you had requested a quotation on?

A. There were several widths I spoke to Mr. Piersol about. I don't recall——

Q. Let's limit ourselves to this first conversation, if we may, Mr. Mills, and to my question: If you don't recall, tell me you don't recall and you wish to explain something you want to make an explanation on, but, as I understood your testimony, your first request was for 39-inch width quotation [159] and 55-inch width quotation, is that correct?

A. It may have been, I don't recall.

Q. You don't remember? A. No.

Q. You don't remember whether you had any discussions with Mr. Piersol as a result of this letter regarding a 55-inch width or not?

A. I don't recall.

Q. Do you have any recollection of any conversations with Mr. Piersol regarding this letter, either before or after?

A. Only that my conversations with Mr. Piersol were for the goods as per specification PA-PD-29 in several various widths.

Q. Did you intend this inquiry you had made, that led to this quotation, to be a firm order?

A. No, sir. I intended to get a price with which I could submit then my proposal to the Government, to see if the Government order would come through.

(Testimony of Leonard J. Mills.)

Q. But your answer was you did not intend your inquiry to be a firm order?

A. I hoped my inquiry would lead up to a firm order.

Q. But you did not intend it to be a firm order?

A. I again put it that way: This was a quotation request for a price which I hoped would lead to a government contract and, in turn, a firm order to Deering-Milliken. [160]

Q. Can you answer yes or no, whether or not you intended this inquiry to be a firm order to Deering-Milliken?

A. I intended it to be a firm order eventually.

Q. But you didn't intend it to be a firm order at this time? A. No.

Q. Thank you.

A. This letter itself wasn't firm.

Q. Thank you.

The Court: What is the exhibit number on that letter?

The Witness: Exhibit 1, your Honor.

Q. (Mr. Lydick): That was the first response that you received in writing, to my inquiry, from Deering-Milliken, is that correct?

A. That is correct.

Q. Had you received this same information prior to the time you got this letter?

A. Yes, by telephone.

Q. Can you recollect whether or not you requested this letter or whether Mr. Piersol just sent it?

(Testimony of Leonard J. Mills.)

A. I requested a letter, too, yes.

Q. Prior to this first request to Deering-Milliken, and this response thereto, had you made inquiries to any other sales agencies or brokers or mills or anyone else? A. Yes, I did. [161]

Q. For quotations to these specific goods?

A. I did.

Q. Who were they?

A. J. P. Stevens, and Iselin-Jefferson. There were three or four others, I just can't recall their names offhand.

Q. Did they have local offices?

A. I believe that most of them did. There may have been one or two that didn't have a local office.

Q. Did you make any inquiries at all directly to the mills?

A. My inquiries were directed to the sales offices of these various companies.

Q. I see. None were directly to the mills?

A. No. I don't know that that would be the proper procedure.

Q. How were these inquiries made, the same way as Deering-Milliken, by telephone?

A. Local offices were by telephone, yes.

Q. Local calls? A. Yes.

Q. Did you receive any quotations from any of those people as a result of those calls?

A. Yes, I did.

Q. Do you recall what any one of those quotations was?

(Testimony of Leonard J. Mills.)

A. They were various prices, but none of them as low as [162] Deering-Milliken price.

Q. Do you recall any one of them specifically?

A. The actual price?

Q. That is correct.

A. No, other than the fact they were higher than Deering-Milliken.

Q. Did you request any of them to be confirmed in writing?

A. Yes, all of them were usually confirmed in writing.

Q. Do you have those confirmations with you?

A. On the quotations?

Q. That is correct.

A. No, sir, I did not bother saving those after I picked on Deering-Milliken's quotations as the one.

Q. You picked on it immediately, is that correct?

A. I picked on it as soon as I issued——

Q. Did you pick on it as a result of these first inquiries and responses?

A. No. By the time I had received the quotations from all of them and found Deering-Milliken to be the lowest, I then considered Deering-Milliken only.

Q. And you destroyed all the correspondence with the others?

A. Yes, in time. I mean I made no effort to save them. They were of no importance at all. [163]

Q. Do you recall what these quotations were?

(Testimony of Leonard J. Mills.)

For example, did any other quotation, either in writing or orally, quote you "in the greige"?

A. Yes, I believe so.

Q. Who was that?

A. Well, on several of the other mills—I don't recall, I don't recall if all of them quoted "in the greige," or just a few of them "in the greige," but I know there was at least one other that was "in the greige."

Q. Which one was it, do you recall?

A. I don't recall.

Q. Was it J. P. Stevens?

A. I couldn't say at this time.

Q. Was it Iselin-Jefferson?

A. As I say, I couldn't say at this point.

Q. Did any of them quote to you in any manner indicating they were quoting unfinished goods?

A. No, sir. The only answer was to meet Specification PA-PD-29.

Q. Isn't it a fact—are you finished?

A. No, I am not.

Q. Isn't it a fact, Mr. Mills, that the Iselin-Jefferson plant quoted you f.o.b. finishing plant?

A. I don't recall that at all.

Q. If they had, would it have meant anything to you? [164]

A. Not so long as it met Specification PA-PD-29.

Q. In other words, you didn't know what "finishing plant" meant?

A. That is correct.

Q. You can't give me the name of any other company whom you might have called, whom you

(Testimony of Leonard J. Mills.)

could check to see if they quoted you "in the greige"?

A. If I looked over a list of names I could tell you whether I had called them or not.

Q. They would be local people?

A. In most instances.

Q. You made no inquiries otherwise?

A. In most instances they were local.

Q. Wasn't your recollection that they were all by phone call?

A. I said the local sources were by phone call.

Q. Do you recall making any inquiries anywhere, other than locally?

A. I believe I made some inquiries, I can't recall just——

Q. Who was that with?

A. If I saw a list of mills I can point out those that I inquired of. When I say "mill" I mean sales offices; whether that is the same as the mill I don't know.

The Court: Would you be able to find such a list, to [165] refresh your recollection, in the telephone book?

The Witness: No, sir. There is a book that is put out by the textile trade which lists all the mills, all the sources of supply for rayon goods and such. I believe it is put out by Women's Wear Daily, for example.

The Court: You don't have it here?

The Witness: No, sir, I haven't.

Q. (By Mr. Lydick): You say you can't give

(Testimony of Leonard J. Mills.)

me the names of any other sales agencies that you contacted, other than Iselin-Jefferson and J. P. Stevens. Could you give me the names of any other cities at which you made inquiry, other than Los Angeles?

A. You are referring, I believe, to the initial inquiries, aren't you?

Q. That is correct.

A. I can't recall at this moment who I did inquire of at the beginning.

Q. Well, you remember J. P. Stevens?

A. Yes.

Q. You remember Iselin-Jefferson Company?

A. Iselin-Jefferson Company, yes.

Q. Can you recall any other city where you made an inquiry? Did you, for example, make an inquiry at San Francisco?

A. No, sir. [166]

Q. Chicago?

A. I don't believe so.

Q. And other cities you can think of, other than Los Angeles?

A. No, sir, I can't recall.

Q. To the best of your recollection, Los Angeles was the only place where you made inquiries?

A. I said local offices. I made several inquiries, and I believe I made some from out of town, just where I don't know.

Q. You can't tell me what city?

A. I can't, no.

Q. What prices were these quotations that you received from any of these other sources that you inquired of?

(Testimony of Leonard J. Mills.)

A. They varied from, oh, 2, 3 cents and higher, and more above the Deering-Milliken quotation.

Q. Which was the closest, do you remember?

A. I don't even recall that.

Q. Did you have any discussions with these various sales agencies' prices with the government people?

A. No, sir, there was no occasion.

Q. You have no writing regarding any of these inquiries or quotations whatsoever?

A. No, sir.

Q. Most of the quotations were f.o.b. somewhere, other [167] than Los Angeles?

A. Or the quotations were f.o.b. the source of supply.

Q. Did you know at that time whether or not these sales agencies represented mills that may have specialized either in greige goods or finished goods?

A. No, sir. I made inquiries of several mills. I have even gotten answers from some, they did not make that particular type of goods.

Q. But you didn't realize at that time that some of them might have only represented greige goods mills and others might have only represented finished goods mills?

A. No. I called the offices and asked if they could supply goods as per Specification PA-PD-29. They either advised me, they either gave me a quotation or advised me they did not have that goods.

Q. You had these specifications in your posses-

(Testimony of Leonard J. Mills.)

sion at all times during the time you received all these quotations? A. Yes, sir, I did.

Q. The fact that Deering-Milliken quotations or anyone else's quotations that you might have received as to "in the greige" meant nothing with respect to this specification?

A. Not so long as it was as per Specification PA-PD-29.

Q. Was this first contact with Deering-Milliken and these other sources you have no record of before or after you had commenced your negotiations with the Government? [168]

A. When you say "commenced" my negotiations, are you referring to before my initial contact with the Government or when they inquired of my plant?

Q. Well, let me put the question another way: At the time of these inquiries and the responses thereto, at what stage were your negotiations?

A. Well, the Government advised me they would be interested in my supplying them with a price on what it would cost the Government for these liners. I then made inquiry from these various mills for the fabric as per Specification PA-PD-29.

Q. During the time of the inquiry to Deering-Milliken, for example, which you testified was around the 18th of December, and during the time you received the responses to that inquiry on January 8th or 9th, whatever the letter says, did you have any further negotiations with the Government?

(Testimony of Leonard J. Mills.)

A. Nothing, no negotiations other than my preparing the figures.

Q. Preparing what figures?

A. The costs, my costs on this particular work.

Q. Did you prepare costs before you received responses to your quotations?

A. Yes. I had taken cost into consideration of it.

Q. On what did you base the cost of goods?

A. I didn't have any cost on goods until they first [169] determined what would be the cost of the goods.

Q. That would be around January 8th or 9th, so far as Deering-Milliken was concerned?

A. Yes.

Q. Going back to my question again——

A. It may have been even at a later date, because I made further inquiries of different widths which may have resulted in a lower cost of goods in the wider widths, which I believe is the case.

Q. So that you had no discussions with the Government then during the period December 18th until after you got these cost figures?

A. That is correct.

Q. Page 43 of your deposition on November 2nd, Mr. Mills, at line 13—let's go back to line 7 to start off correctly. I asked you the question, "When did you think was the first time you ever spoke to Mr. Piersol?"

And you answered, "I am not sure whether the first time was before I submitted my price to the Government or after I submitted my price to the

(Testimony of Leonard J. Mills.)

Government and was advised that I would get the contract."

A. That was in person, I believe, was the inference there, when I saw him in person, wasn't it?

Q. Well, the question was, "When do you think was the first time you ever spoke to Mr. Piersol?"

You tell me now you understood that question to mean you spoke to him in person.

A. If I said I wasn't sure as to whether it was before or after I received the contract from the Government, it definitely must have been whether I saw him in person, because I spoke to Mr. Piersol distinctly several times prior to my getting the notice from the Government that I would get the contract.

Q. I see. Well then, immediately following the question was, "When do you think that was you submitted the price to the Government?"

And your answer was, "The 18th of December, approximately, and I saw Mr. Piersol for the first time. I spoke to him on the phone several times before I saw him for the first time. Now, whether that was before I received word that the Government would give me the contract or right after that I am not sure."

Do you recollect that testimony?

A. Yes. I noticed that in my deposition—and I believe I made a correction there——

Mr. Lincoff: Your Honor, I would like to advise counsel that on page 43 of the deposition of Leonard Mills appear the following changes:

(Testimony of Leonard J. Mills.)

At line 13 the word "was" is stricken, so that the question now reads, "When do you think that you submitted the [171] price to the Government?"

Mr. Lydick: You are changing my question?

Mr. Lincoff: No.

Mr. Lydick: You are.

Mr. Lincoff: I think that is only a typographical error, the addition of the word "was."

I think if you read it the word "was" doesn't belong in that.

Mr. Lydick: I agree with that.

Mr. Lincoff: On line 15, on the same page, the word "December" is changed to "January."

On line 21, the word "December" is changed to "January."

On line 22, the word "January" is changed to "February."

Line 23, the word "January" is changed to "February."

There are no other corrections, except as indicated.

Q. (By Mr. Lydick): With respect to those questions counsel has pointed out to the court, what was it, between November 2nd and today, whatever date it was, that refreshed your recollection as to those dates?

A. Going over the dates of the various documents and so on in the files, which gave me an opportunity to chronologically put each of the items in its place.

(Testimony of Leonard J. Mills.)

Q. What documents were they that required you to make this change?

A. For example, starting with December 18th was when [172] the Government first submitted this proposal to me to—or, rather, approached me to consider——

Q. What document did you have in your file to indicate that that was the time the Government first approached you?

A. I am not sure. Mr. Lincoff has my papers there. I am not sure just what it was.

Q. Do you care to look at them, to find out which one it was?

Mr. Lincoff: Let the record show I am placing before Mr. Mills two Manila folders containing various documents, which I will state to the court are the only files, other than my own working papers, handed to me by Mr. Mills.

Those, of course, as well as everything in my own file, personal files, which are not strictly confidential are also available for Mr. Lydick to examine about.

The Court: Do you think we ought to have these files marked for identification?

Mr. Lydick: No. Just for the purpose of refreshing his recollection.

The Witness: The proposal to figure on the 75 mm liners, and which we received the same day the proposal to figure on the 105 mm liners, was dated the 18th day of December.

Mr. Lydick: Do you have any objection if I look at that?

(Testimony of Leonard J. Mills.)

Mr. Lincoff: Not at all.

Q. (By Mr. Lydick): I take it then that at that time, [173] that is, the time of the response to the first inquiry you had made, by Deering-Milliken, was dated around January 8th or 9th. You have it before you. At that time you had not submitted any prices or figures to the Government at all?

A. That is correct.

Q. You have corrected your deposition, accordingly, after having refreshed your recollection during the intervening three-week period by reviewing your file?

A. That is correct.

Q. You had not reviewed your file at the time of your deposition?

A. No, I had not.

Q. What did you do after receipt of this letter from Mr. Piersol?

Mr. Lincoff: Please read the question.

(The question was read.)

Q. (By Mr. Lydick): Of course, with respect to this particular situation of the contract with the Government.

A. It was some time after the receipt of that letter, within a day or two or so, when I had received answers to my inquiries from the various sources that I reached—I don't believe it stopped with that letter. There were further inquiries for further widths, so nothing was done until I had determined what the cost of the goods was going to be.

Q. When was that? [174]

(Testimony of Leonard J. Mills.)

A. Well, sometime prior to the 21st of January, when I submitted my figures to the Government.

Q. On January 21st for the first time you submitted some figures to the Government, is that correct?

A. I believe the date was January 21st.

Q. Do you have anything in your file that permits you to fix that date as being on or around that time?

A. To the best of my recollection I think the 21st of January was the date that I was supposed to submit the figures to the Government.

Q. Do you have anything in your file to verify that?

A. I don't recall whether there was or not.

Q. Do you mind looking——

A. I have nothing here that would indicate the 21st of January. However, I am quite certain that the 21st of January was the date at which the proposal was to be submitted—my figures were to be submitted to the Government.

Q. At the time of the deposition you thought it was probably sometime in December?

A. If that is so in the deposition, it is not correct, because I had until the 21st of January in which time to submit the figures to the Government.

Q. Then on January 21st you believe is the time you did submit the figures to the Government?

A. That is correct. [175]

Q. You have nothing in your file that indicates

(Testimony of Leonard J. Mills.)

that would be the case, that is just a recollection?

A. I have nothing here that would indicate that, no.

Q. You recollect that date specifically or about that date, is that correct, Mr. Mills?

A. We did come to that conclusion in setting these dates up right along. It couldn't have been in December because I didn't have any quotations from Deering-Milliken before the——

Q. You came to that conclusion in setting up these various dates after your deposition and before trial?

A. That is correct.

Q. Do you recollect any additional inquiries to Deering-Milliken prior to this January 21st date, when you submitted these quotations to the Government?

A. Yes, I believe I have some letters giving me further quotations prior to that date.

Q. Do you have any recollection of any previous conversations that are not referred to in the letters?

A. I recollect there were conversations. I don't recall just which——

Q. Do you, by chance, recollect that after receipt of the January 8th or 9th quotation that you requested an option on those goods from 30 to 60 days?

A. Yes, when we submitted our figures to the Government [176] we had to submit with our figures how long that price would hold. So that the Government would have time to consider. And I did consult with Mr. Piersol on a 30-day figure.

(Testimony of Leonard J. Mills.)

Q. What did he tell you?

A. That it would be subject to the mills having the looms available at that time. But that the chances were very good, but there was no way they could commit themselves for 30 days.

Q. Did he tell you you could not have an option?

A. He did not say we could not have an option. I guess he did imply we could not have an option in that sense, but the chances are the loom being available. Incidentally, I passed that on to the Government in that sense, and they said, "That is customary, that an option is not secured on the goods." But that they would give us an answer as quickly as possible, so we could tie up the loom space.

Q. Was it customary that the Government tell you that an option not be given or did the Government tell you they had to have a figure that would hold good for a period of time?

A. It was customary that an option is not given to tie up the loom space just so long as the price is fairly within its limits.

Q. Mr. Piersol told you that any quotation was subject to there being loom space available and the mill accepting or [177] rejecting a particular order.

A. For a 30-day period.

Q. Did he give you a 30-day option?

A. No, he didn't.

Q. He refused the option?

A. That is right.

(Testimony of Leonard J. Mills.)

The Court: You say for a 30-day period. Where did you get that understanding?

The Witness: Because the Government wanted 30 days' time, asked if they could have as much as 30 days' time to consider my proposals. I tried to get a 30-day option from Mr. Piersol, which he couldn't give me.

The Court: Now we are getting down to where you are giving conclusions, and this case involves particularly your relation with Mr. Piersol and his company, rather than with the company.

Tell us what you said to him and what he said to you, which led you to that conclusion.

The Witness: I asked Mr. Piersol if I could have a 30-day option and he said he could not give us an option for 30 days.

Q. (By Mr. Lydick): Did he tell you why?

Mr. Lydick: Excuse me, your Honor.

The Witness: That the mill would not tie up its loom space for that length of time. [178]

Q. (By Mr. Lydick): When was your next inquiry for any quotation to Deering-Milliken?

A. There were some changes that I started to consider in the width of the fabric. I called Mr. Piersol and asked him for the price to that particular width.

Q. Was this before you made your proposal to the Government?

A. No, this was at the—yes, I am sorry, before I made any proposal to the Government.

(Testimony of Leonard J. Mills.)

Q. Does that refer to the January 16th letter you testified to on your direct testimony?

A. You mean the next quotation, January 16th?

Q. Yes. A. Yes.

Q. I believe that is Plaintiff's Exhibit 2. With that document before you, Mr. Mills, do you have any better recollection of what your next inquiry to Deering-Milliken was for?

A. Yes. From this letter it would be for a $42\frac{1}{2}$ -inch width, a $45\frac{1}{2}$ -inch width, and it seems that I may have asked them on the phone for a $47\frac{1}{2}$ -inch width, which I made a notation in pencil on there.

Q. You think the $47\frac{1}{2}$ -inch width was about this same time?

A. Well, it was immediately after my receiving this [179] letter, since I made a penciled notation on the letter.

Q. Well, there are many pencil notations on letters. Were those price notations made immediately after the letter?

A. Yes. In other words, on approximately the 16th of January I received this letter. The letter is for $45\frac{1}{2}$ -inch width at $38\frac{1}{2}$ cents, and $42\frac{1}{2}$ -inch width at $36\frac{1}{2}$ cents.

I then made a penciled notation on there showing $47\frac{1}{2}$ -inch width at $39\frac{3}{4}$ cents.

Q. Is that higher or lower than the letter figure?

A. That pencil notation, there was no letter figure for $47\frac{1}{2}$ -inch width in the letter itself. In other words, I added the $47\frac{1}{2}$ -inch width.

(Testimony of Leonard J. Mills.)

Q. You think you did that immediately after this letter?

A. Within a day or two after getting his letter, when I may have made it.

Q. What other pencil notations are there on the letter?

A. Then there shows a price reduction, in other words, the 47½-inch width, the initial price was 39¾. That is crossed over and marked 38½.

45½-inch width, with a typed price of 38½ cents, is reduced to 37¼ cents.

Q. When did you make those pencil notations?

A. When an inquiry from Mr. Piersol resulted in a lowering of the price, to the prices I mentioned. That may have resulted sometime later. I don't know just when. [180]

Q. What makes you think you made some of these pencil notations immediately afterward and some of them sometime later? You don't know just when?

A. That is right.

Q. What makes you think that?

A. Because of the fact that the prices were changed, which was only as a result of an inquiry from him.

Q. My question again was, what makes you think that the pencil notations you made regarding the 47½-inch width was immediately after the telephone call that is referred to in that letter, whereas the price notation changes were sometime later, you don't know when?

A. Because a price change such as that, amount-

(Testimony of Leonard J. Mills.)

ing to a fraction of a cent, may have resulted because of a difference in time of as much as a week on to two weeks, possibly. Whereas, price change wouldn't take place in a matter of a day or two.

Q. No other reason? A. That is right.

Q. That you could think of?

A. That is my conclusion.

Q. As a matter of fact, isn't it true that you later requested that a better price be quoted?

A. I most certainly would have. I believe I did, too.

Q. Didn't you testify in your deposition that this [181] price was voluntarily reduced?

A. It may have been voluntarily reduced, too. I didn't say I wouldn't request a better price. I said I most certainly would. I always would request better prices, whenever I am looking for a price on something I want to buy.

Q. These notations here, which you think indicate a better price had been obtained, do you recall whether you requested a better price and that led to the changes in these notations?

A. I don't recall whether I requested them.

Q. What is the date of this quotation?

A. January 16th.

Q. Do you believe, or, did you believe that was a contract? A. No, sir.

Q. Was it after you received this letter that you made your first proposals to the Government?

A. I believe that is correct.

Q. Had you had any additional responses from

(Testimony of Leonard J. Mills.)

any of these other responses that you have mentioned? A. I did.

Q. During that period?

A. I don't know just when they took place, but it was prior to this date—or prior to the 21st, I would say.

Q. Prior to the 21st? [182] A. Yes.

Q. Did you have any responses from any of the people of whom you had inquired after the 21st?

A. The people I inquired of after the 21st you are referring to is like Paul Whitin & Company, is that right?

Q. No. I mean inquiries for quotations to go ahead with the Government.

A. No, I don't believe there was any inquiry after Deering-Milliken notified me they couldn't supply, weren't able to ship the first shipment of goods to me.

Q. After January 21st you had no negotiations with any sales agencies until after your trouble with Deering-Milliken? A. That is correct.

Q. When was the next time you made any inquiry of Deering-Milliken?

A. When the Government advised me that the contract would be mine for the 105 mm shells, I then got together with Mr. Piersol.

Q. When had the Government advised you that the contract would be yours for 105 mm shells?

A. About the 5th of February.

Q. About the 5th of February? A. Yes.

Q. At that time the Government told you that

(Testimony of Leonard J. Mills.)

the contract would be yours for the 105 mm portion? [183]

A. That I was being considered for that contract.

Q. That you were being considered for that contract? A. Yes.

Q. As a matter of fact, Mr. Mills, you knew before you had any contract at all it had to be reduced to writing, insofar as the Government was concerned, didn't you? A. Oh, yes.

Q. Was the February 6th contact the next one with Deering-Milliken, you believe?

A. That is correct.

Q. Those were your personal conversations you testified to with Mr. Piersol?

A. That is correct.

Q. Wherein you discussed the specifications with Mr. Piersol and you discussed the differences with them?

A. The specifications were always in the conversation and negotiations.

Q. This was later sometime in your office?

A. That is correct.

Q. This was done in an office?

A. Yes.

Q. And laid them out on the table?

A. That is right, shortly after the 6th of February. On the 6th of February I was advised by the Government and within a day or two I was over at Mr. Piersol's office, telling [184] him the good news.

Q. What was the good news again?

(Testimony of Leonard J. Mills.)

A. That the Government was considering my proposal, that the Government was accepting my proposal to manufacture those liners.

Q. I don't want to trap you, Mr. Mills. I would like to know whether they were just considering you or had accepted your proposal.

A. At that time they had accepted my proposal.

Q. This was sometime immediately after the 6th of February, is that right?

A. That is correct.

Q. Now, after the 6th or 7th or 8th of February conference with Mr. Piersol, the exact date you don't remember, what was the next contact you had with Deering-Milliken?

A. Between the 6th of February and the 6th of March I was negotiating with the Government on the price, and secured a 10 per cent price increase on my initial price I had submitted to the Government.

I may have at that time discussed delivery dates with Mr. Piersol, too, because the Government was quite interested in a delivery schedule to them. The initial schedule that was in the initial proposal that was drawing to a very tight margin there, between the government contract and the time of the first delivery, so that we got a new schedule from the [185] Government, and we were trying to fit that together with Deering-Milliken, and we were consulting with Mr. Piersol and the Government at the same time.

I also was able to secure an increase of 10 per

(Testimony of Leonard J. Mills.)

cent in the price from the Government on these liners.

Mr. Lydick: Now, would you read my question again, Madam Reporter?

(The question was read.)

The Witness: I don't recall any exact date, other than the fact there were several between the 6th of February and the 6th of March.

Q. (By Mr. Lydick): Those were concerning delivery schedules?

A. Delivery schedules, yes, sir, was one thing.

Q. What else?

A. I believe I got a lower price from Mr. Piersol, too, on the fabric.

Q. Anything else that you remember discussing during that period?

A. Yes. I made inquiry of him—the Government asked me for a pilot run. I then called Mr. Piersol and asked him if he would let me have approximately 50 yards of this fabric, as per specification PA-PD-29, on which we were negotiating.

Q. This was again between February 6th and March 6th?

A. I am not sure of that date, as to when that incident [186] came up. But it was sometime around the 6th of March there, or I believe it was after the 6th of March, I guess.

Q. What else did you discuss besides delivery and price between February 6th and March 6th that you can recollect?

A. I can't recollect anything else.

(Testimony of Leonard J. Mills.)

Q. Did you make any inquiries regarding new widths during that period?

A. I am not sure whether I had or not.

Q. Do you think you would have?

A. I may have, if there was reason to.

Q. Were you still negotiating with the Government then for some reason?

A. Yes. My negotiations with the Government at that time was as to price. And also delivery schedule.

Q. You have a letter, I believe, you introduced—probably Plaintiff's Exhibit 3—dated February 8, 1952. So that your recollection can be refreshed, I show you that letter and ask you whether or not you had inquired for the figures noted therein?

Will you read that letter for the court and myself?

A. Yes. The letter is addressed to me.

“Pursuant to our conversation this morning, I am confirming the price as of January 21, 1952, on Specification PA-PD-29, 47½-inch width, which is 39¾ cents. You are, of course, aware that our price is subject to [187] change without notice.”

It is signed by Henry Kramer of Deering-Milliken & Co.

The Court: What is that exhibit number?

The Witness: Exhibit No. 3, sir.

Q. (By Mr. Lydick): It is dated February 8th, is it not? A. That is correct.

Q. It has to do with this 47½-inch width, does it not? A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Why does it confirm a quotation as of January 21st?

A. At this time I am not able to recollect as to the reason for this delay. It may have been late in getting out of the Deering-Milliken office.

Q. Isn't it a fact that the quotation had been given to you orally on January 21st, and it was on this date or about this date that you requested it be confirmed in writing?

A. I don't know that I made a request for it to be confirmed in writing; I may have. I just don't recall whether I had or whether it was sent to me.

Q. Mr. Mills, what, if anything, did you know about Deering-Milliken when you first came to their local sales office in Los Angeles?

A. Nothing, other than the fact that they are one of the leading fabric houses in the country.

Q. Did you know they were a sales agent?

A. I had no idea as to whether they were called a sales [188] agent or the actual manufacturers, or just what. They were one of the national, largest national concerns in the country for the securing of various types of fabric.

Q. Did you know whether they manufactured these fabrics themselves, that is, loomed them themselves?

A. I had no idea of just whether they owned the mills or they represented the mills in some way or other.

Q. By this time of February 6th to March 6th,

(Testimony of Leonard J. Mills.)

that period in there, had you acquired any additional knowledge regarding their function?

A. No, I had not.

Q. Several times during your deposition you testified to the effect that Mr. Piersol had to refer everything to New York.

A. That is correct.

Q. You had learned that much, hadn't you?

A. Well, yes. Whenever I would make an inquiry of Mr. Piersol he would say, "I will get in touch with New York and get a current quotation on it or find out if the mill can meet such and such a schedule, or what the price will be of this rather than the other width."

Q. Everything had to be referred to New York?

A. That is correct.

Q. Mr. Mills, had you after these nearly two months of negotiations learned anything else about Deering-Milliken [189] and its operations?

A. Nothing.

Q. Had Mr. Piersol at any time told you that when and if you did get ready to give an order, that order would have to be submitted to New York?

A. Well, I imagine the implication is just that.

Q. Did he imply to you that during that period—did you know or had you learned by that time, after some two months of these inquiries and quotations, that if you did submit an order it would have to be accepted by someone other than Mr. Piersol?

A. No, I didn't learn anything like that.

(Testimony of Leonard J. Mills.)

Q. Did you have any impression regarding that?

A. My impression was that Mr. Piersol could accept the order; whether he had to clear it with New York first or not I don't know, but that he could accept the order right there.

Q. That was your impression?

A. That is right. That very definitely was implied to me, too.

Q. By whom? A. By Mr. Piersol.

Q. When?

The Court: You are giving us a legal conclusion, it was implied by Mr. Piersol. You don't have to say what Mr. Piersol said or did that amounted to an implication, to you [190] it is up to the judge to decide whether that was sufficient to justify what you contend.

Q. (By Mr. Lydick): When and what did he say that gave you that impression?

A. Every one of his letters was addressed as regional manager. That in itself would imply that.

Q. Mr. Mills, didn't you just testify that you knew that he had to refer to New York even an inquiry for quotation?

A. That is right, because the market price was in New York; it wasn't out here. Not that the market price was possibly in New York, but New York may have had to inquire of the mill, in turn.

Q. Is that what he told you about this market price being in New York or is that what you assumed?

A. That is what he told me every instance that

(Testimony of Leonard J. Mills.)

I inquired for some information on something, and he always referred it back to New York to get that information.

Q. Did he tell you why he referred it back to New York?

A. Because the price was there. In other words, the price may vary on the yarn and such.

Q. The price, is that part of an order?

A. Beg pardon?

Q. Is the price a part of an order?

A. I assume so. [191]

Q. Then don't you think he would have had to refer to New York before he could accept the order, too?

A. It is my understanding he did.

Q. It is your understanding that he also had to refer to New York before he could accept an order, is that correct?

A. It is my understanding that he did do that before he accepted the order.

Q. I know, but was it your understanding he had to? A. Yes, that is correct.

Q. You did understand at that time it was necessary to submit an order in writing, when you got ready to submit a firm order?

A. That is correct.

Q. Did you understand at that time that it was necessary, for the acceptance of that order, to be in writing? A. That is correct.

Q. Was it your understanding at that time that if there was an order and an acceptance, that all of

(Testimony of Leonard J. Mills.)

the terms of that order and acceptance would have to be reduced to writing and then signed by you and signed by Deering-Milliken?

A. It is my very definite and clear understanding that I had received a firm contract from Deering-Milliken before I committed myself to the Government.

Q. I don't believe that is entirely responsive.

Mr. Lydick: Will you please read the question, Madam [192] Reporter?

(The question was read.)

Mr. Lincoff: At this time, your Honor please, I wish to interpose an objection. I refrained this far, although I thought all these questions about your understanding, along the line of your Honor's comment, are incompetent. They are improper as to what your understanding is. That calls for a conclusion or opinion and invades the court's province. On that ground it would be incompetent.

I think he should ask, as your Honor suggested, "What was your conversation or what did Mr. Piersol do or what did Mr. Piersol say?" We do not want to create the impression we have any information to withhold.

I think the way the question is framed it calls improperly for speculation by this witness. On that ground I will object.

The Court: The objection with respect to the form of the question is good, and sustained.

Mr. Lydick: Without objecting to your ruling——

(Testimony of Leonard J. Mills.)

The Court: You might ask me to reconsider.

Mr. Lydick: It isn't necessary. I will be happy to reframe the question.

It is my understanding that it is entirely proper in a contract proceeding, where we don't have the alleged instrument set out before us, and we can see it, where we have something [193] else, promissory estoppel perhaps, or a series of conversations, we can look into these people's minds and ask them what their understanding was at a particular time.

If I am incorrect on that, then I will have to revise a substantial part of my questioning. Perhaps there is some written document they claim to be the final contract embodying all the terms. Is there?

The Court: I don't recall there being a written order. There is oral testimony about some order.

There is some document, I believe a colored piece of paper, which purports to be an acceptance.

The oral testimony, insofar as I can see the appropriateness of it now, is to clear ambiguities, to define the understanding of terms as they are used in that written acceptance, and state what the terms of the oral order were.

Now, I might be, as I often am, wrong in my understanding. If so, you may either give me authority or argue it.

Mr. Lydick: Well, I don't know at what date these people claim there was a contract. I can't tell from the pleadings when this contract is supposed to have been breached. And I can't tell from the

(Testimony of Leonard J. Mills.)

pleadings what the alleged terms of it are supposed to have been.

The Court: If there was a contract, and that is something upon which decision will have to be reserved until after the submission of the cause, I can tell you the date on which [194] I think it jelled into a contract, if it ever did that.

May I see the exhibits, Mr. Clerk, particularly that pink one.

The Clerk: Yes, sir.

The Court: Well, I can see now the pink one here is not it. It would appear to the court that if there was a contract entered into between these parties, that the offer was made sometime prior to Exhibit 8, and that the sending out of Exhibit 8 by Deering-Milliken on 3-14-52 amounted to an acceptance.

Mr. Lydick: Is that the theory of plaintiff?

The Court: That, I understand, is the theory. What the finding is, of course, is going to depend upon a lot of things. That is what he is arguing and what I gathered from the flow of testimony and documentary evidence up to now.

Mr. Lydick: I don't think that is the case, your Honor. I think you are confused, as I am.

May I ask the witness.

Q. (By Mr. Lydick): Is that the date you think the matter jelled into a contract?

Mr. Lincoff: Just a moment, your Honor please. I will object to that. I think clearly that calls for a conclusion. That is a matter that this honorable

(Testimony of Leonard J. Mills.)

court is going to have to determine after argument and/or brief upon submission.

The Court: That is probably so. However, I can't tell [195] for a certainty now but what the state of mind of the witness on that point is material. Hence, the objection will be overruled.

You might look over this Exhibit 8. I don't know, did I correctly state your contention?

Mr. Lincoff: Your Honor, according to our pleadings we have alleged that a contract was made on the 6th of March, 1952.

The Court: Then are you treating this memorandum of 3-14-52, Exhibit 8 as an offer, rather than an acceptance?

Mr. Lincoff: No, sir. I am treating that only as a confirmation of the agreement made on March 6th, as the result of a series of correspondence culminating on that date.

Mr. Lydick: In other words, the contract was entered into on March 6th?

The Court: Was this contract an oral one, one arising from the acts of the parties, or was it one of which there was a memorandum by putting together several of these exhibits?

Mr. Lincoff: That is exactly it, your Honor. And in our original opening brief we cited law with respect to that proposition. I think the case of *King vs. Stanley*, in California that you may have a validly executed and enforceable contract, based upon a series of memoranda and/or documents, and that that is the theory upon which we relied,

(Testimony of Leonard J. Mills.)

and that you need not have a formally drawn and technical instrument. [196]

The Court: I don't think counsel is arguing with you there. He says that the succession of documents and conversations here did not amount to a contract, as I understand it.

You are saying they did.

Mr. Lydick: When did they finally amount to one in your mind, on the 6th or on the 14th or on some other date?

Mr. Lincoff: Are you addressing that question to me?

Mr. Lydick: The witness or Mr. Lincoff. You, since you have interposed the objection. I think it is a fair question.

Mr. Lincoff: I have made my objection, and your Honor has ruled. I think it is up to the witness now to answer the question. I don't think the court can be bound by my interpretation at this stage.

The Court: I have not intended to state any theory the court is going on. The court is just sitting here wondering, up to now, but I did state what I apparently erroneously understood to be certain definiteness to your theory, which was not accurate.

Now, Miss Reporter, will you read the question?

(The record was read.)

The Court: I think perhaps I misstated what I understood your position to be. I don't understand that you are saying there was no contract.

(Testimony of Leonard J. Mills.)

Mr. Lydick: We are saying there was no contract.

The Court: You are contending that there was a different [197] contract than what the plaintiff contends?

Mr. Lydick: Our position is clearly there was no contract. We are trying to determine when the alleged contract was supposed to have come into being.

The Court: All right. Go ahead and explore further.

Q. (By Mr. Lydick): In your pleading, entitled "Complaint," Paragraph X thereof, page 4, may I read:

"That prior to the aforesaid 14th day of March, 1952, to wit, sometime during the month of January, 1952, plaintiff and the defendant Deering-Milliken & Co. Inc. had conversations wherein the plaintiff and the said defendant discussed the conditions, circumstances, terms and manner under and in which the said defendant might undertake and agree to manufacture or have manufactured and delivered to the plaintiff the said rayon cartridge cloth to be used by said plaintiff in the manufacture of the aforesaid ordnance items under and pursuant to the aforesaid contract of March 14, 1952."

That reference being to the contract with the Government.

"That said conversations, together with certain negotiations in writing were continued and carried

(Testimony of Leonard J. Mills.)

on by and between the plaintiff and said defendant until on or about the 6th day of March, 1952, on or about which said date a contract was made, executed and [198] delivered upon the terms and conditions hereinafter set forth."

Is that the contract you are suing on in this action, the one dated March 6, 1952?

A. I believe the contract that we have entered into as of March 6, 1952.

Q. Going back to my question that you testified that you knew a written order would have to be placed—that written order being placed by you—I ask again, did you or did you not know that the terms of that order and the terms of the acceptance thereof by Deering-Milliken would have to be reduced to writing and executed by both you and Deering-Milliken?

A. It is my understanding that prior to Mr. Piersol's giving me the letters confirming our contract, he had made the necessary inquiries with the proper people in New York and then given me those letters.

Mr. Lydick: May I have the question read?

(The question was read.)

The Witness: It is my understanding that when I came back to Mr. Piersol and said, "Mr. Piersol, Ordnance is ready and has the contract for me, they want confirmation from you that I have a contract with you," and that he made inquiry of New York and got authority to give me those letters that as of that moment we had a contract. But that is when

(Testimony of Leonard J. Mills.)

I [199] then committed myself to the Government.

Q. (By Mr. Lydick): Did you or did you not believe or did you or did you not know that your contract with Deering-Milliken would have to be reduced to writing?

Mr. Lincoff: I object to that, if your Honor please, on the ground it is immaterial. The question has been asked and answered.

Mr. Lydick: It has not been answered.

Mr. Lincoff: I think the answer was perfectly responsive to the question.

The Court: Overruled.

The Witness: Will you repeat the question?

Q. (By Mr. Lydick): Did you know that your contract with Deering-Milliken would have to be reduced to writing?

A. It was my belief that the letters that I received from Mr. Piersol were binding on Deering-Milliken.

Mr. Lydick: Would you read my first question again, please, Madam Reporter?

(The question was read.)

The Court: That rather assumes certain facts, and I think it is getting argumentative, what his understanding of a particular letter is.

Mr. Lydick: I am not talking about a particular letter, your Honor. I am just trying to inquire whether or not after two months of negotiations, inquiries, quotations, whether or [200] not he had learned enough about Deering-Milliken to know whether or not any final agreement he might enter

(Testimony of Leonard J. Mills.)

into with them would have to be reduced to writing.

The Court: I will ask a couple of questions and see if that will take care of it.

Did anyone from Deering-Milliken ever tell you anything to the effect of what counsel has just been asking?

The Witness: No, sir, not in so many words.

The Court: Well, in what words? Tell us the words then and we will——

The Witness: They didn't say anything as to what would be any particular form of contract that was required. It was my understanding, and knowing that if I received a letter that spells out an agreement, that they will do such and such a thing, that that in itself is an agreement and a contract in that sense.

The Court: Did they ever tell you an order would have to be signed in order to perform?

The Witness: No, sir.

The Court: Did they ever tell you you acted at your own risk unless you had an acceptance?

The Witness: No, sir.

The Court: Did they ever say anything to the effect, "Let's get together and write an agreement"?

The Witness: No, sir. [201]

The Court: Did they ever say anything in substance to that effect?

The Witness: No, sir.

Mr. Lydick: May I ask a question?

The Court: Yes.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Did they tell you there were no options?

A. That is right, they did; no 30-day options.

Q. Did they tell you you could get any kind of an option from them, when you asked them whether you could get an option?

A. The time I inquired for an option was for a 30-day option, and Mr. Piersol said the mill would not tie up anything for so long a period of time, they were in no position to. It was in reference only to a 30-day option.

Q. Did he tell you that he would give you any kind of an option?

A. No. I didn't ask for any kind of an option.

Q. Did you, after this two months of discussions with Deering-Milliken,—and very intermittent, I understand, only a few inquiries and a few quotations—but did you by this time, that is, by this February 6th or 8th period know that Deering-Milliken was only a sales agent?

A. No, sir, I didn't.

Q. What did you think they were? [202]

Mr. Lincoff: Objected to as immaterial, your Honor. I think also——

The Court: Sustained.

Mr. Lincoff: ——the question has been asked and answered twice previously.

The Court: He is testifying to conversations and correspondence with that particular company. Now, unless there is some effort to hold an undisclosed principal to what is contended to be a contract, I

(Testimony of Leonard J. Mills.)

don't think it makes any difference whether he understood their position, as merely a sales agent, or broker, or whether he understood it to be that of the manufacturer, because liability, if any, is predicated upon whether there was a contract, not with what the character of the contracting party is.

Mr. Lydick: Well, I will accept your Honor's decision, of course.

The Court: You accept it during the noon hour then.

Mr. Lydick: The basic purpose of this examination is that I am trying to bring out some other things, during the entire examination that goes back to my opening address that the real basis for this entire misunderstanding grows out of the entire lack of understanding of this plaintiff about an industry he knows nothing about.

The Court: I don't like to sustain objections which, at the time of submission, appear to have been going into a line [203] which at that time we will have felt was beneficial, although presently we do not.

I will live with my decision until 2:00, or would you rather say 1:45? Then you may try again. The present ruling will stand, but we will say it was as to the particular question.

You can try again, if you want to, in a slightly different form. Will it inconvenience anyone to be here at 1:45?

Mr. Lydick: Nearly any other time would be all

right. I have a conference scheduled between 12:30 and 1:00.

The Court: Will 2:00 o'clock be all right?

Mr. Lydick: Yes.

Mr. Lincoff: May I inquire, pursuant to our understanding on Friday, Mr. Piersol will be available to follow Mr. Mills?

Mr. Lydick: Absolutely. Mr. Piersol is in his office awaiting a call at the present time.

There undoubtedly will be some redirect. In any event, he is on call.

I will tell you a few minutes before I intend to conclude, and if you don't anticipate any redirect we can call him then.

The Court: I am anxious to get this case concluded because we have this week's trial calendar, too. We expected originally to start yours the first of last week and instead we started it at the end.

Take whatever time is necessary, but I will appreciate it if one witness can immediately follow the other, so that, if possible, we can conclude this in another day or so.

Mr. Lincoff: Fine, sir.

The Court: We will recess until 2:00.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [205]

Afternoon Session, 2:10 p.m.

The Clerk: May we proceed, your Honor?

The Court: Yes.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): Mr. Mills, we have been discussing the period generally of February 6th to March 6th. May I ask you to relate in your own words precisely what happened in the period immediately preceding March 6th?

A. During that period most of my efforts were in the negotiation of the government contract with the Ordnance Department in Pasadena. We were negotiating on price, which ended with a 10 per cent increase in my price.

The reason for that increase was based on the fact that I had only gotten the contract for the 105 mm shells, rather than on the combination of the 105 and 75 mm shells.

The Court: Did you have a regular formal written contract with the Government?

The Witness: No, sir. It was a formal written proposal is what they call a negotiated contract. Whereas, they were only considering me for the smaller portion of the entire [206] original proposal, they gave me to figure on, I felt I should ask them for an increase in price, which I secured.

The Court: When you came down to where you and the Government were on the basis of contracting, was it written up as a formal contract?

The Witness: Yes, sir. My negotiations with

(Testimony of Leonard J. Mills.)

Deering-Milliken at that time were on a status quo basis, based on the price they had submitted to me.

It was on approximately March 6th that the Government told me that I would—I have a contract with them, but they wanted evidence of a contract with Deering-Milliken, assuring—to assure them that I was able to secure the goods.

I then went to Mr. Piersol and told him I had a contract with the Government, and they wanted evidence from him showing that I was able to secure the goods from Deering-Milliken.

This resulted in a phone call by Mr. Piersol to Mr. Burns of the Ordnance Department, advising I had a contract with them and it was confirmed by a letter dictated by Mr. Piersol immediately after that phone call.

Q. (By Mr. Lydick): Just one letter, Mr. Mills?

A. No, sir, he wrote—well, one letter to the Ordnance Department to advise them that I definitely had a contract.

At the same time he dictated a letter to me confirming to me that I had a contract with Deering-Milliken. [207]

Q. Now, I believe it is correct that March 3rd was Monday. Do you recollect any negotiations with Mr. Piersol in the immediate days preceding this one of March 6th?

A. I am not sure of any negotiations exactly, I mean other than——

Q. Were you making any statements to him in

(Testimony of Leonard J. Mills.)

that period, March 4th and 5th, say, a couple of days just preceding?

A. I can't recall. I believe if you mention them to me I may remember whether I did or not.

Q. What was that last?

A. I say I can't recall of any in particular, but if you mention some you had in mind I could recall whether I did or I didn't, I believe.

Q. Did you have any conversation with him in that immediate period regarding some quotations on some widths, for example? Just a couple of days before March 6th, say, the 4th or the 5th.

A. I can't recall whether it was just before then or not.

Q. Do you have any recollection of any negotiations or requests or inquiries to Mr. Piersol regarding any new prices just immediately preceding the 6th, say, the 4th and 5th?

A. None other than those that I had secured.

Q. Do you recall giving Mr. Piersol any information with regard to credit on the days immediately preceding the 6th, say, the 4th and 5th? [208]

A. None other than the fact I secured a 90 per cent partial payment clause.

Q. You told him that? A. Oh, yes.

Q. Nothing else?

A. Nothing that I can recall.

Q. Do you recall closing your inquiring of Mr. Piersol at that time regarding any new delivery schedules? A. I spoke to Mr. Piersol.

Q. That is, immediately, one or two days imme-

(Testimony of Leonard J. Mills.)

diately preceding? I meant to qualify the question by saying in that immediate preceding period.

A. In the immediate preceding period there were negotiations with the Government and at the same time with Deering-Milliken, trying to get a delivery schedule that would jibe.

Q. You mean the period about the 4th or 5th of March?

A. Whether it was that close or not I don't know.

Q. I am limiting my examination for the moment to that immediately preceding period.

A. I can't recall.

Q. Do you have any recollection of any discussion with Mr. Piersol in this immediate preceding period regarding terms, that is, with respect to whether you would get 30 days, 60 days or 70 days terms or anything like that?

A. Yes, sir, the basis of the order at that time was [209] it would be a C.O.D. basis, you might say, or upon presentation of invoice and upon my securing the 90 per cent partial payment clause.

I discussed with Mr. Piersol my paying for it on the arrival of the goods here in Los Angeles, at which time the Government would give me full payment for the goods and I could turn it over to Deering-Milliken.

Q. This conversation was in this immediately preceding period?

A. Just about that time. I don't recall just when.

(Testimony of Leonard J. Mills.)

Q. You don't recall whether it was before or after?

A. It was in the immediate area, within two or three days of the 6th, one way or the other.

Q. Is it my understanding that you testified that you proposed to Deering-Milliken either immediately preceding or immediately after March 6th that you make payment on a C.O.D. basis or they said they would only consider payment on that basis?

A. I was perfectly willing and able to make it on presentation of invoice. I preferred making it on arrival of goods here, so that the Government could then give me the money, and I, in turn, turn it over to Deering-Milliken, Mr. Piersol.

Q. You have no recollection of asking for any extended credit terms at that time? [210]

A. Yes, I was asking for them to pay for it at the time of the arrival of the goods here, on arrival of bill of lading.

Q. By extended credit terms you meant 30 days terms or 60 days terms, or anything like that?

A. No.

Q. You didn't ask for anything like that?

A. No, because of the 90-day partial payment clause.

Q. You weren't interested in any long terms, such as 30 days or 60 days?

A. Not after I got the 90-day partial payment clause.

Q. And that was before March 6th?

(Testimony of Leonard J. Mills.)

A. Yes.

Q. Did you have any discussion with Mr. Piersol at this time with respect to whether or not the new quantity or any other features might require his checking the Military again or checking New York again?

A. No, sir. The only change that took place immediately after the 6th——

Q. Just immediately preceding is all I am interested in. A. I can't recall.

Q. On March 6th you say that you received two letters from Mr. Piersol, is that correct?

A. That is correct.

Q. Is that correct? A. Yes. [211]

Mr. Lydick: Could I have Plaintiff's Exhibits 6 and 7, Mr. Clerk?

The Clerk: Yes, sir.

Mr. Lydick: If it please the court, I would like to give the witness an opportunity to read both of these letters, to refresh his recollection. Then if the court would indulge me I would like the court to read both of these letters before we go ahead.

The Court: I will read anything you offer and is received in evidence at any time that either counsel think I should read it, in order to preserve a proper continuity.

Mr. Lydick: I think it would be better. I would like to have him read it and then you read it.

The Court: You had better get it into evidence before I read it.

Mr. Lincoff: It is in.

(Testimony of Leonard J. Mills.)

The Witness: Is there any particular order in which you prefer me to read this?

Q. (By Mr. Lydick): No. You go ahead and read them to yourself in any order you may wish.

Mr. Lydick: I don't believe I caught the court's inquiry with respect to getting these in evidence. You understood these are in evidence?

The Court: I am sorry. I did not understand that. I was suggesting they get into evidence before the court be [212] asked to read them.

Mr. Lydick: I believe these are, your Honor, Plaintiff's 6 and 7.

The Court: Thank you.

Q. (By Mr. Lydick): Would you care to have these before you while you are testifying regarding them? A. If I may.

Q. Certainly. Now, where did your conversation with Mr. Piersol immediately preceding the preparation of these letters take place?

A. At his office.

Q. Tell us what you told him and what he told you.

A. I called on Mr. Piersol and told him that the Ordnance Department has advised me that they—that I have a contract with them. They only desire to have confirmation of the fact I have purchased and secured the goods from Deering-Milliken.

I said Mr. Burns would like to have Mr. Piersol call him and advise him of that. Mr. Piersol did that while I was sitting there.

(Testimony of Leonard J. Mills.)

After the conversation Mr. Piersol then dictated these letters.

Q. Which one did he dictate first, the one that begins, "We understand from our conversation in this office that we have consummated a contract," or the one that begins, [213] "This will confirm our quotation of today"?

A. I don't recall which he dictated first. They both were dictated at approximately the same time.

Q. Did you assist him in the wording of the one that begins, "We understand from our conversation today in this office that we have consummated a contract"?

A. By assisting him you mean what, sir?

Q. Assisting him in the words, the phrasing of it.

A. Nothing other than I told him I needed one letter for the Ordnance Department, showing that I had—as evidence, I had entered into a contract.

Q. Mr. Mills, do you recall who else was present during the course of dictation of those two letters, if anyone?

A. I can't recall, other than I assume the girl that took the dictation was present.

Q. What did you say again was the purpose for obtaining the letters addressed, starting out, "We understand from our conversation today in this office that we have consummated a contract with you"?

A. That letter was written for the benefit of the

(Testimony of Leonard J. Mills.)

Ordinance Department, to show them that I had consummated a contract with Deering-Milliken.

Q. I see. What was the purpose of the other letter?

A. That was confirmation to me, that we had entered into a contract. [214]

Q. Turning then to that second letter, you state that that was written so that you would have written confirmation that you had a contract, is that correct?

A. That is correct.

Q. What were the terms of that contract?

A. That I would receive "101,200 yards of 45 $\frac{1}{2}$ -inch rayon cartridge cloth in the greige as per Government Specification PXS-1300 at 36 $\frac{1}{8}$ cents per yard and 23,900 yards of the same material in 47 $\frac{1}{2}$ -inch width in the greige at 37 $\frac{3}{8}$ cents per yard, both on terms of net 30 days, delivery to start in April and spread out to completion."

Q. Any other terms of that contract, as you recall it?

A. No, that is it.

Q. This is the correct price?

A. The correct price—that was the price for those widths, yes.

Q. Those are the correct widths?

A. They were subsequently changed.

Q. We are talking about this—this is as you stated, you stated this was the contract, now?

A. I believe it is.

Q. The correct quantities.

A. Yes, sir.

Q. Did it make any difference when delivery started in April, from your point of view? [215]

(Testimony of Leonard J. Mills.)

A. Yes, the confirmed—the actual delivery schedule was to be given to me by the Ordnance Department and I, in turn, was to give it to Mr. Piersol.

Q. But that didn't include how near your term was to start in April and spread out to completion?

A. That is correct, but it was approximately that time that the government contract would also take place. I mean that the government delivery schedule would take place.

The Court: Do you know of any document that is in evidence here which will tell us what Specification PXS-1330 would be?

The Witness: Yes, sir.

Mr. Lydick: It is in evidence, I believe, your Honor.

The Court: Which exhibit is this?

Mr. Lincoff: That is Exhibit 5, if your Honor please.

The Court: May I have Exhibit 5?

The Clerk: Yes, sir.

The Court: Thank you.

Mr. Lydick: May I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Lydick): What do the first four or five words say? I believe you paraphrased that portion of it. What do they say precisely?

A. You want me to read that?

Q. Yes, the first four or five words. [216]

A. "This will confirm our quotation to you of today on 101,200——"

(Testimony of Leonard J. Mills.)

Q. That is correct. How does that language in any way differ from any of the quotations you received during the preceding two months and a half?

You had that written confirmation dated January 6th and another one on the 16th, I believe, one February 8th. How does this language differ in any way from that?

Mr. Lincoff: That is objected to, if your Honor please, on the ground that calls for a conclusion and opinion of the witness.

I respectfully submit that the documents will speak for themselves with respect to whether there is a similarity or dissimilarity.

The Court: That objection, I think, is good. I will have to rely on counsel to point out in the evidence what the contents of the various documents are wherein the similarity or dissimilarity is present.

Q. (By Mr. Lincoff): Will you read the last paragraph of that letter, Exhibit 7?

A. "We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the Government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to [217] confirm it."

Q. What did you say and what did Mr. Piersol say with respect to that letter?

A. The only thing——

Q. You understand we don't want your conclu-

(Testimony of Leonard J. Mills.)

sions. Your counsel will object to that. Say what you said and what he said.

A. I am not able to recall what conversation passed regarding this. I know what was in my mind and I feel sure I know what was in Mr. Piersol's mind when this was written.

Q. What was in your mind?

A. This was a confirmation to me I had a contract with Deering-Milliken.

Q. That last paragraph, that is what it meant to you?

A. Yes, that is right. That is right.

Q. Will you read it aloud for me?

A. "We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the Government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it."

The only confirmation that stood out there was only on the delivery schedule. In other words, the order for the goods and everything was all set except the exact delivery [218] schedule days were to be confirmed by the government contract.

Q. Now, about credit——

A. There was no question on credit, other than as to the terms of how I would pay for it, whether it would be on receipt of the bill of lading, that is, of the goods here on presentation of invoice.

Q. This says, "* * * both on terms of net 30 days."

(Testimony of Leonard J. Mills.)

A. There would be approximately 30 days between the time the goods was shipped and the time they arrived here. There would be about two or three——

Q. Is that what that 30 days means to you?

A. That was the 30 of the lag between the time of making out the invoice at the mill and the time it would reach here.

Q. Your testimony is that the terms of net 30 days meant some 30-day lag in the delivery and not as it might be as a customary meaning in the trade.

A. 30 days means 30 days from the date of invoice. The invoice is made out at the time the goods is ready to be shipped at the mill. These goods are coming by boat. There could be—almost, there wouldn't be in this case; I know it was going to be less than 30 days. It was going to be about three weeks. There could be that difference between the date of invoice and the receipt of goods here in Los Angeles.

Q. That is what this meant? [219]

A. That is right. I, on top of that, had requested—I had requested the 30 days, when Mr. Piersol suggested——

Q. You had requested the net 30 days terms?

A. That is right.

Q. I thought you just testified a few moments ago it was always C.O.D., so far as you were concerned, because of your 90-day payment clause, it didn't make any difference to you.

(Testimony of Leonard J. Mills.)

A. No, you are mistaken. C.O.D. was what Deering-Milliken wanted. In other words, C.O.D., date of invoice there.

Q. When did they ask you for——

A. Beg pardon?

Q. When did they ask you for that, before or after this letter?

A. No, they asked me for that after this letter.

Q. So that the credit terms hadn't been agreed on by anybody at that time. This was just another proposal, more or less, before you got any credit, at any rate?

A. No, sir, at the same time these letters took place Mr. Piersol requested I call Mr. Smith, the credit manager of Deering-Milliken, in New York.

Q. This was on March 6th?

A. Oh, approximately—no, it wasn't on March 6th, but right in that period. [220]

Q. Before or after?

A. I am not sure, but it was right in the interim——

Q. But it wasn't at the same time?

A. No, not while I was sitting there. He asked me to call Mr. Smith and explain to him just what the 90 per cent partial payment clause meant with the Government, so that I could secure these 30-day terms, or upon receipt of goods here in Los Angeles.

I called Mr. Smith. I explained to him that 90 per cent partial payment clause meant that the Government was going to give me the entire amount of the invoice of the goods that would arrive here,

(Testimony of Leonard J. Mills.)

upon its arrival here. They would also give me all my direct labor costs, 100 per cent of my direct labor costs each week, up to a total of 90 per cent of the entire contract.

Mr. Smith then agreed that if I would give them an advance payment of 10 per cent of the entire contract they would then go along on this basis of that, upon receipt of goods here.

I passed that information on to Mr. Piersol and that is what brought on the payment of the 10 per cent, of my check for 10 per cent of the total contract.

Q. When was this you had this conversation with Mr. Smith, in relation to this March 6th letter?

A. I believe it was approximately the 10th or 12th of [221] March, now I recall the sequence of events with the letters and such.

Q. Four to six days later?

A. That is right.

Q. You at the time these letters were written agreed with the Government on all the important terms of your contract with them, quantity, and price, advance payment clause, delivery?

A. That is right.

Q. Had your government contract yet been reduced to writing?

A. The advance copy of the government contract was received by me on the 10th of March.

Q. Then it hadn't been reduced to writing?

A. The terms had been laid out and it was a matter of sending them to me. It was a matter of

(Testimony of Leonard J. Mills.)

sending it to me after the 6th of March; I received it about the 10th of March.

Q. They required that you get some letter from Mr. Piersol to show you could get the goods before they would give you the contract?

A. That is right.

Q. They weren't going forward with it unless you got something from Mr. Piersol to show you had a source for these goods?

A. That is what Mr. Burns requested of me.

Q. Turning to the other letter, the one that starts out that, "We have consummated a contract," which has as its last sentence, "This memo is written with the idea of submitting it to the Government Procurement Office."

At whose request was that sentence put in the letter, at yours or Mr. Piersol's, or was it at anyone's request?

A. To the best of my recollection this was requested by the Ordnance Department and it was—that was why this letter was written, so that I, in turn, could bring it over and give it to the Ordnance Department.

Q. So you told Mr. Piersol, after you put it in the letter—

A. Mr. Burns may have told him that on the phone, too.

Q. But you told him, also?

A. I may have. I may not. I don't recall any exact conversation. The Ordnance Department wanted it, and I, in turn, then wanted it.

(Testimony of Leonard J. Mills.)

Q. Was there any price set out anywhere in that letter that ends that way and begins, "We understand from our conversation today in this office we have consummated a contract"?

A. No, because this was a letter to advise the Ordnance Department I had entered into a contract with Deering-Milliken. It was not required to stipulate what price I was paying for the goods.

Q. Did you tell Mr. Piersol that and that is why he [223] left the price out of that one?

A. I imagine so. I imagine Mr. Piersol must have realized it. In other words, all that was requested of Mr. Piersol was confirmation to the Ordnance Department of the fact I had a contract with Deering-Milliken.

Q. All you needed before the Ordnance Department would go ahead and give you your written contract?

A. That is right, and this letter confirms the fact I have a contract with Deering-Milliken.

Q. So you could go and get your written contract from the Government? A. Yes.

Q. In your cost quotations to the Government, Mr. Mills, had you included a figure showing the cost of the goods? A. Only in total.

Q. The total amount?

A. Total dollars and cents.

Q. Do you remember what that figure was?

A. I could get it from my files.

Q. Do you have copies of your cost proposals to the Government?

(Testimony of Leonard J. Mills.)

A. I have a breakdown of my cost proposals, of my proposals of the entire contract.

Q. Is this something you made up since the trouble with Deering-Milliken began or something you made up and presented [224] to the Government?

A. I had computed those costs before I submitted it to the Government. I made a compilation of those various——

Q. Do you have a document made up prior to March 6th and any time prior to that, or any time prior to March 1st? A. No.

Q. You can't tell me the original price you quoted to them? A. The total amount?

Q. Yes. This is on the goods.

A. About \$45,000.00, approximately.

Q. You are sure you didn't leave the price out of this letter and it was because you were determining it to be quite a bit less than you told the Government you were going to get it for?

A. I didn't think it was any of their concern. They only wanted confirmation of the fact I had a firm order from Deering-Milliken. This letter was only to submit that as evidence to the Ordnance Department.

The Court: Your compilation you furnished the Government, did that show the parts of each component, either of labor or materials that would go into the finished product?

The Witness: Yes. It shows a breakdown, the

(Testimony of Leonard J. Mills.)

dollars and cents the rayon was going to cost. That would cost forty-five thousand some-odd dollars.

The thread was going to cost me—the figure submitted to the Government in the original proposal included the thread; that was a couple of hundred dollars or less.

And the rayon and the total figure—in other words, the cost of the material used in manufacture amounted to so much in dollars and cents.

The Court: Did you keep a copy of it?

Mr. Lincoff: Your Honor, I have a summary of all those costs in my files.

The Court: Well, what we want to know, though, is not what summary you might have today, but what summary you gave the Government at the outset of these——

The Witness: When I submitted the proposal to the Government, they gave us just enough copies to submit to them for their consideration.

When I didn't get the proposal on the 75 mm shells, for example, they returned it with a letter advising me of that, my proposal on the 75 mm shells.

But on the 105 they never returned it to me. They called me on the phone, that I was being considered for this, and we went into further negotiations and they had those papers at all times and still have them, I believe.

Q. (By Mr. Lydick): You never had a copy of them?

A. No. I had no copy to keep, other than what

(Testimony of Leonard J. Mills.)

papers I submitted to them at the end. I did have figures of each [226] particular operation, from which I compiled my figures which I submitted.

Q. That you made up at that time?

A. That I made up at the time I submitted to the Government——

Q. Do you still have those?

A. I had those on the sheet I submitted to you yesterday.

Q. You said those were made up long after March 21st. I want the figures you had at the time you were dealing with the Government, papers with those figures on them.

Mr. Lydick: Our problem is this, your Honor: As both Mr. Lincoff and I know from our pretrial stipulation, the United States has indicated they are going to refuse to bring in their files on this case because they are confidential.

As a result, it is very important we try to get anything in writing that Mr. Mills has, that he made up before March 21st. Any copy of any kind of a writing with respect to his negotiations with the Government and the quotations he made up before March 21st.

Q. (By Mr. Lydick): I take it you don't have any of those?

A. I have figures I mentioned. Mr. Lincoff has those.

Mr. Lincoff: I have here, and I think I have advised Mr. Lydick I have here, the form of proposal and all the [227] correspondence pertaining to the

(Testimony of Leonard J. Mills.)

liners of the 75 mm cartridges. This is the one, of course, as the witness has testified, which was not awarded to him.

Consequently, as the letter of transmittal here would indicate, they were returned to him. If your Honor would want to see, solely for the purpose of seeing the details required to be furnished, I will be very happy for you to see it. We have no objection.

The Court: The nature of the form, and those things, have been so directly in my knowledge, when I held other positions than the present,—

Mr. Lincoff: Surely.

The Court: —I don't think it is necessary. I don't see that it is necessary to bring in any more information, as to the type of forms, for me, unless it has some direct bearing in the case. I can appreciate some counsel wanting to have something that was made, some calculation or record of calculation which was made contemporaneously with or preceding the submission of those figures to the Government.

It used to be people would come into the United States Attorney's Office, while I was employed there, and say, would want a subpoena on the ground that some documents they needed were considered confidential.

And many times I have seen the representatives on such occasions enter into some kind of working agreement with the [228] parties, the other side, and try to arrange it so that the record could be

(Testimony of Leonard J. Mills.)

made available for the purpose of either a conference or litigation and then to return them, and in that way they were not made available to the general public. I think possibly that procedure would still be available. And something might be worked out.

Mr. Lincoff: I know Mr. Lydick tried it, he was there 24 hours before I was. We were out at the Department of the Army, Ordnance District, Pasadena. I spoke with Mr. Burns and Mr. Wegner, who apparently is the legal officer in charge, and I spoke with Colonel Bready. Up and down the line we were advised that none of the correspondence and none of the files would be made available. They had no independent recollection with respect to matters and they would not release the documents until the proper authority was given in Washington.

As Mr. Lydick said, in all probability it contained classified material that couldn't be made available. We discussed it. I think Mr. Lydick was there on Tuesday and I was there on Monday. We came to the conclusion we had generally been given the same type of treatment up there.

Anything that will facilitate the production of the Government's files, we are perfectly happy to go along with, that will sustain the complaint insofar as we allege as to the cost and what our profit would be.

Mr. Lydick: I will accept the offer and we will call [229] and see if Mr. Wegner, the legal officer,

(Testimony of Leonard J. Mills.)

will produce the files on the basis of such stipulation between the parties.

I think it is pursuant to a manual he uses, which says he shall produce no files unless he gets authority from Washington. I doubt if a stipulation from Mr. Lincoff and I will get any files. That is why I have been trying to see if Mr. Mills had anything in his file that he might have made up prior to March 21st, which indicates any other figures he quoted to the Government or the dates on which he quoted them.

I will go ahead with my testimony.

The Court: With the witness' testimony?

Mr. Lydick: Yes.

Q. (By Mr. Lydick): Tell me, Mr. Mills, about the discrepancy in these two letters with respect to delivery. I note in the letter which was written for the purpose of the Government, it says, "Delivery on both items to start the week end April 25th," and yet in the one starting, "This will confirm our quotation," it says "Delivery will start in April and spread out to completion."

Was there anything insignificant as to the April 25th date?

A. No, sir. I think that was approximately the date that was contemplated that the thing was to start.

Q. Contemplated by whom?

A. By both Mr. Piersol and the Government, and so on. In other words,—— [230]

(Testimony of Leonard J. Mills.)

Q. Mr. Piersol, I take it as to him there hadn't been any agreement on delivery schedule yet?

A. There had been, but we were waiting for the confirmed contract from the Government, which was received two or three days later after this letter.

Q. This one goes on to say, to the Government, "We hope to be able to arrange shipment of these goods to completion 1/6 of each width every two weeks." And yet there is nothing about that at all in the letter between yourself and Mr. Piersol starting, "This will confirm our quotation."

A. It was understood. Even the final terms that we had arranged with Mr. Piersol, they were to be delivered in six shipments every two weeks.

Q. When were those final terms arrived at?

A. They were arrived at at that time. All future correspondence with Deering-Milliken supports that.

Q. That was the time that that was arrived at? What was the agreement again?

A. That they would make a shipment every two weeks, of approximately one-sixth, every two weeks.

Q. And that agreement was arrived at on March 6th?

A. That is right. Our contract was consummated in its entirety. There was no doubt in my mind and I am sure there was no doubt in Mr. Piersol's mind, until he was instructed otherwise. [231]

Q. Mr. Piersol will be on the stand and he can tell what was in his mind.

A. Until he had a definite contract with the Gov-

(Testimony of Leonard J. Mills.)

ernment,—I went and obligated myself to the Government based on that fact.

Q. I know that is your contention. This language such as “the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.”

You can't tell me what Mr. Piersol meant by that. But can you tell me what your understanding of the meaning of that language was?

A. As soon as I had the delivery schedule from the Government, reduced to writing, Mr. Piersol would then confirm delivery schedule on it.

Q. That is what those words, when read, meant to you? A. That is right.

Q. The words “to your receipt of the contract from the Government” had no meaning with respect to the written contract you knew you had to get from the Government?

A. The Government, I was certainly convinced and there was no question, I believe, in the Government's mind or my mind but that the contract was there.

It was told to me I had the contract as soon as I could produce evidence I had a contract with Deering-Milliken. Immediately upon my producing that evidence in the form of [232] this letter Mr. Burns immediately set the wheels turning to get the written contract to me.

Q. What did these words mean, “We are tele-typing your order for these goods to our home office

(Testimony of Leonard J. Mills.)

tonight subject to your receipt of the contract from the Government”?

A. That was the delivery schedule.

Q. That was the delivery schedule?

A. Yes, just the delivery schedule as to when the mill would start shipping the first shipment and each subsequent shipment.

Q. That was the delivery schedule. I thought the sentence, or, the remainder of that paragraph was what you testified was the delivery schedule, “of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.”

What did that mean?

A. That meant in case there was too much of a delay between the Government giving me a delivery schedule and the time we submitted it to the mill, that the mill may not be able to clear it, but that never came to pass. The mill was able to deliver it when it got its confirmation.

Q. It was?

A. Yes, it was, because of the correspondence we got from it, and because of the fact that they requested the 10 per cent check on the thing which was further evidence of it [233] because——

Q. What was the 10 per cent check for again?

A. As an advance payment on this contract.

Q. Advance payment for a specific amount of the goods? A. That is right.

Q. We will get to that later. Isn't it a fact that

(Testimony of Leonard J. Mills.)

that was truly a deposit to guarantee your performance of any contract they might enter into?

A. Mr. Smith, after discussing it with him and explaining to him I was getting this partial payment clause from the Government, then as security for Deering-Milliken, he felt if I would pay for the last 10 per cent of the quantity of the goods, in other words, the last 10 per cent that would be shipped to me, in advance, that would be security enough to Deering-Milliken that I would abide by all the entire contract.

Q. So as a deposit, as security for your performance of any agreement, before they would enter into it——

A. I carefully worked it out with him, it would be in payment for the last 10 per cent of the goods.

Q. It would be applied as payment and they would keep it in their possession and apply it as the last——

A. No. The check and everything, the agreement, everything was drawn out. This was in payment for so many yards that amounted to the last 10 per cent of the goods to be shipped to me. [234]

Q. You put that on there?

A. That is the terms I specifically worked out with Mr. Smith. I don't think that is of any materiality, any material consequence, but that was the terms. In other words,——

Q. When were you supposed to deposit that check, as long as we are on the subject?

A. Upon request.

(Testimony of Leonard J. Mills.)

Q. Upon request?

A. Upon request of Deering-Milliken.

Q. Are you sure it wasn't supposed to be deposited with the written contract?

A. No, sir, it wasn't.

Q. As long as we are on this conversation with Mr. Smith, you are sure the name was Smith?

A. No, sir, I am not sure. Mr. Lincoff gave me the name as being Mr. Smith, that was the credit man. I wasn't sure at the time he mentioned it to me.

I believe he got it from the deposition or some place there. I am not at all sure. But it was the credit man that Mr. Piersol requested me to call.

Q. You were present at Mr. Piersol's deposition, so you wouldn't have had to get anything like that. In other words, you don't remember the name of the man you talked with in New York?

A. No, sir, other than the fact he was the credit man. [235]

Q. You don't recall his name?

A. No, but Mr. Piersol requested me to call him and gave me his name at that time.

Q. But it wasn't necessarily Smith?

A. No, sir. It may not have been.

Q. You are definitely certain this 10 per cent deposit wasn't to be made at the time you got the written contract for signature and returned to them with the written contract for signature?

A. No, sir, because my conversation with Mr. Smith had already—after I entered into a contract

(Testimony of Leonard J. Mills.)

with Deering-Milliken, my conversation with Mr. Smith was only on the basis of payment.

Q. What you mean was that was a conclusion, as counsel pointed out to you? You mean it was after March 6th? A. That is right.

Q. This all took place with respect to these letters in Mr. Piersol's office on March 6th?

A. I missed that.

Q. These two letters of March 6th were both written in Mr. Piersol's office in your presence?

A. That is correct.

Q. The originals of them were given to you that day? A. That is right.

Q. Did he telephone to anyone while you were in the [236] office? A. Mr. Burns.

Q. Anyone else?

A. Not that I can recall.

Q. Were there any discussions of seconds at the time you were discussing these two letters?

A. I am sorry. Discussion as to what?

Q. Of seconds.

A. There were discussions of seconds. I don't recall just when they took place.

Q. Do you think they were at the time these letters were being discussed, or before or after?

A. I am not at all sure. I know that I understood the basis of the seconds—I understood them at that time, and how much before that time I don't know.

Q. You don't know whether those discussions took place that day or before or afterward?

(Testimony of Leonard J. Mills.)

A. It must have been before. I am not at all sure, because I was fully aware—no, it was before, because I was fully aware of the situation on seconds when I figured my costs with the Government.

Q. Oh, you were? A. Yes.

Q. Was there agreement on the method of shipment at the time that you had these March 6th discussions? [237] A. Yes, sir.

Q. Why weren't they included in the letters?

A. Because those would be instructions that Mr. Piersol would forward to New York and give the mill instructions as to how they wanted it shipped the first time.

Q. It wasn't important to you that be in that contract?

Mr. Lincoff: I object to that, if your Honor please, as calling for conclusion and opinion.

The Court: Sustained.

Q. (By Mr. Lydick): What were your discussions regarding shipment at that time? Just what was said by you and what he told you.

A. It was understood the first shipment would come——

Q. I want to know what was said by you and what was said by Mr. Piersol. I don't want to know what you understood.

A. I told Mr. Piersol that the first shipment should come by rail, so I could start immediately in order to meet that first delivery date that the Government wanted.

Q. This was on March 6th?

(Testimony of Leonard J. Mills.)

A. This was prior to March 6th. Always, whenever we discussed it, we would discuss we were trying to get the Government's date——

Q. I want your discussion regarding shipment; what you told him and what he told you.

A. I don't recall what we—— [238]

Q. Did you have any discussion?

A. We had discussion, but I don't remember whether it was this word or that word just that day. I can tell you what we discussed.

Q. On March 6th?

A. It may be a few days one way or the other.

Q. Can you tell me if you had any discussion with reference to method of shipment at all on March 6th?

A. I cannot recall whether it was on that day.

Q. Can you tell me why this was not included in either of these letters?

Mr. Lincoff: I object on the grounds previously assigned, your Honor.

Q. (By Mr. Lydick): If you know.

Mr. Lincoff: It call for the opinion and conclusion of the witness.

Q. (By Mr. Lydick): Do you know why it was not concluded in either of these letters?

The Court: He has put a modified question and I think it is proper.

The Witness: Because it was understood——

The Court: That question may be answered yes or no, do you know.

(Testimony of Leonard J. Mills.)

Read the question.

(The question was read.) [239]

The Witness: No, I do not.

Q. (By Mr. Lydick): You don't know now?

A. I don't know what, sir?

Q. You don't know whether it wasn't included in either of those letters? A. That is right.

Q. What was the purpose of this other letter, again, this one that started out, "This will confirm our quotation to you today"?

A. That was confirmation to me of the contract I had with Deering-Milliken to procure those goods from them.

Q. Did you make any objection at all to the language of the first sentence, "This will confirm our quotation"? A. No, sir, I did not.

Q. Did you sign anything this day, with either the Government or Deering-Milliken?

A. I cannot recall whether I signed anything on that particular day.

Q. What is your best recollection, that you did or you did not?

A. I can't recall whether anything was signed on that particular day.

Q. Do you have any recollection of signing anything?

A. I don't have any recollection one way or the other, frankly. [240]

Q. Do you have anything in your files that indicated you signed anything that day?

A. I do not believe I have.

(Testimony of Leonard J. Mills.)

Q. Did you ever send anything in writing to Deering-Milliken?

A. Nothing that I can recall at this moment.

Q. Are you aware that contracts for the sale of goods in the amount of \$500,000.00 must be in writing?

Mr. Lincoff: Objected to, if your Honor please, on the ground it calls for a conclusion of law. This man has not been qualified as an expert in the law with respect to Section 1624 of the Civil Code.

The Court: Sustained. It is a question of law for the court and for counsel to treat in argument. It seems there has been a great deal of argument with the witness, and we are making very slow progress. We approach the end of the second day of this trial and we are still with the first witness, in a case we originally estimated would require a day to a day and a half to try.

You have now had a day and a half, and the first witness is not finished yet. I would like to have counsel let me know how long it is going to require to finish this case.

In reliance on that original estimate—I can't remember whose it was, one of the counsel in the case estimated that at the time it was set. I would like to know how much longer it [241] is going to take to try this case, because the court does have other commitments which were made in reliance upon the probable duration of trial.

If we can't finish it within fairly short order we will have to try it partly and then recess it to an-

(Testimony of Leonard J. Mills.)

other day, to complete it, which is an unsatisfactory thing. Having been in session for an hour this afternoon, we will now take a short recess.

(Short recess taken.)

Mr. Lydick: Your Honor, with respect to the time which we estimate will be required for the trial of this matter, we conservatively estimate at least two days and a half more will be required.

The Court: Two days and a half after today?

Mr. Lydick: Conservatively speaking—our estimate would include today—two and a half days. Most of that time, according to Mr. Lincoff's estimate, would be mine; about six and a half or seven hours will be mine.

The Court: All right. We will do what we can to get it through, without too much delay for counsel, but I am not going to delay the Ortiz case. It is a jury case which has been delayed several times and it concerns subject matter I don't think we can equitably delay longer.

So we will proceed with this case.

Q. (By Mr. Lydick): Mr. Mills, moving on from the date [242] these two letters were written, March 6th, what happened, if you recall, or did you have any further conferences with Mr. Piersol during the ensuing week?

A. On approximately the 10th of March I received the advance copy of the government contract, and advised Mr. Piersol immediately I had the advance copy of the government contract.

Q. Did you receive this with a covering letter?

(Testimony of Leonard J. Mills.)

A. Yes, sir, I believe there was a covering letter.

Q. Do you have that letter?

A. Mr. Lincoff may have it. I am not sure of the covering letter, but I remember receiving the contract about the 10th of March.

Mr. Lincoff: In the interest of saving time, I will look for it, Mr. Lydick, and if I come across it I will bring it to your attention.

Mr. Lydick: If it is not brought to my attention I assume you don't have it?

Mr. Lincoff: Yes. You are talking about the——

The Witness: Advance copy of the contract.

Q. (By Mr. Lydick): I don't know what the advance copy means. Will you tell me what that means? Is that the one you ultimately signed that is in evidence here?

A. No, that is the final contract.

Q. When did you receive the final contract?

A. I am not sure of the date, without looking at it to refresh my memory.

Q. Anyway, you recall definitely that it was March 10th that you notified Mr. Piersol you had received the advance copy? A. That is right.

Q. What did you do with the advance copy?

A. I had the advance copy here.

Q. All right. Now then, when was it you received the copy that you signed?

A. I am not sure of the date. It was shortly after the 10th, when I received the advance copy.

Q. Could it have been within three or four days?

A. Possibly.

(Testimony of Leonard J. Mills.)

Q. Perhaps the 14th? That was a Friday.

A. I am not sure of the date, without looking at it. It is here. We can easily get that point by looking at it.

Q. By looking at the contract you can tell me what date you received it?

A. I believe so.

Mr. Lydick: Exhibit 12, Mr. Clerk.

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Can you tell me now when you received that?

A. Approximately the 14th of March.

Q. Approximately the 14th of March. During the period [244] March 6th and March 14th, had you had any discussions with Mr. Piersol, other than those you have already testified to?

A. I believe it was in that—just about that time that I asked Mr. Piersol whether it wouldn't be, whether it wasn't satisfactory to, instead of buying two widths, such as the letter of March 6th indicates, to buy all this one width, and he said there was this question about that it would be satisfactory.

Q. Did he confirm that in writing?

A. I believe it was confirmed by the memorandum of order, if I am not mistaken.

Q. I see. Did you have any credit discussions during this period, March 6th to March 14th, with anyone of Deering-Milliken?

A. Yes. That is when I spoke to the credit man whose name I am not sure of.

(Testimony of Leonard J. Mills.)

Q. It was during that period, March 6th to March 14th, that you talked with the credit man in New York? A. It was right in that time.

Q. Did you have any discussions regarding samples during that period?

A. It wasn't for samples. That wasn't the correct term. But just——

Q. Samples of the goods you were buying?

A. There wasn't talk about samples. We didn't request [245] any samples of the goods in that sense. I think what you may be referring to, Mr. Lydick, is Colonel Heath of the Ordnance Department called on me about the 10th of March and said they would need a pilot run of these liners, consisting of 100 units, which would require some fifty yards or less than fifty yards, which they would have to send to Joliet, the Ordnance Department in Joliet for analysis.

I called Mr. Piersol and we had a discussion as to whether the mill would be able to furnish me such a small quantity of goods without—before they run the order.

Mr. Piersol said he would contact his New York office and see if they could furnish me with those 50 yards.

Q. You think that was during this period, March 6th to March 14th, to the best of your recollection?

A. That is about right. It was just about that time.

Q. Did you have any further discussion regarding seconds during that period?

(Testimony of Leonard J. Mills.)

A. None, other than I can recall it was explained to me—you mean just during that period?

Q. Yes. A. I don't recall any.

Q. You believe you executed the government contract on March 14th, as you said, or around that time?

A. That is correct. I signed the final copy.

Q. Did you have any contact with Mr. Piersol at that [246] time?

A. I believe I have mentioned all the facts which required my contacting him. I believe there was further discussion about that particular 50-yard piece of goods.

Mr. Piersol called me and said he got word from New York office they were sending the goods to Colonel Heath of the Pasadena Ordnance Office, in error of sending it to me, because when he sent them the TWX he explained, he said that Colonel Heath of the Pasadena Ordnance Office required a 50-yard amount of goods.

He advised they were sending that piece of goods direct, which was in error. And I called Colonel Heath and told him he was going to get that 50-yard piece and to advise me he got it.

Q. Did you have any conversation with Mr. Peirsol with respect to your having signed your contract with the Government on March 14th? Did you have such conversation?

A. I believe I told him that I signed the—I signed the contract. I am not sure whether I mentioned it to him then or just that I received the

(Testimony of Leonard J. Mills.)

advance copy on the 10th. My memory is not sure on that point.

Q. Isn't it a fact that on March 14th you called Mr. Piersol and told him you had signed the government contract and he now could send in your order?

A. I will not deny the fact I may have told him that, [247] but my order had gone in prior to that.

On March 14th I received the memorandum of order from Mr. Piersol, which confirms the fact that the contract was let even before the 14th.

Q. In your mind it confirms it, you mean. Is there anything on the memorandum that says that?

A. The memorandum of order is—it is my opinion that the memorandum of order is confirmation, further confirmation of the fact that a contract has been entered into.

Q. We will get to the memorandum in a moment, Mr. Mills. After the signing of your contract with the Government, did you have any contact with any of your other suppliers?

A. Only regarding that 50-yard piece.

Q. Now, your other suppliers, not Deering-Miliken.

A. You mean as for the thread and such?

Q. Thread, packaging material.

A. I had the price on it. They had it on price. The packaging material was any size box that would be approximately that. There was no particular advance order required on that merchandise.

(Testimony of Leonard J. Mills.)

Q. You had no correspondence with any of these other people, the thread people?

A. They were all local sources that were available.

Q. Isn't it a fact that on March 14th you told Mr. Piersol that you wanted to place an order and gave him at [248] that time the new single width?

A. It may have been March 14th they changed the width. However, the order had been placed at the time of March 6th.

Mr. Lydick: Plaintiff's Exhibit 8, could I see it?

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Isn't it a fact that on that date you told Mr. Piersol you wanted delivery to be made one-sixth every two weeks starting with the earliest possible date, but not later than April 18th?

A. It may have been so. I don't recollect exactly.

Q. Isn't it a fact that at that time you told him that you wanted the earliest possible Arrow Line sailing from Charleston, South Carolina, starting time not to be later than April 18th and earlier, if possible?

A. That may have figured in my calculations. I don't remember at this point whether that was the calculation then. I know the shipment by boat was figured to arrive at approximately the time I would need the second shipment. The first shipment was coming by rail and the second shipment by boat to tie in with my need for that second shipment.

(Testimony of Leonard J. Mills.)

Q. But those matters weren't mentioned in the March 6th letter, they were mentioned in writing for the first time, so far as you know, in the March 14th memorandum of order?

A. They were mentioned in our conversations. They may not have been in that March 6th letter.

Q. Isn't it a fact you told him on that date, March 14th, that your credit arrangements with the New York credit manager was 10 per cent deposit with contract?

A. I explained to Mr. Piersol my conversation with Mr. Smith. I pointed out to him it may have been March 10th. It was approximately that time. I pointed out to him I had arranged with Mr. Smith I was to give him 10 per cent in payment for the last 10 per cent of the goods.

Mr. Piersol noted that carefully and he was pleased with it, as well as I was, the basis on which we would make payment.

Q. Isn't it a fact that you told him at that time that you wanted the goods shipped in bales?

A. That is correct. I don't know whether it was then or before, but I did want them shipped in bales.

Q. Well, I am sorry to have to extend the cross examination, but do you know when it was that you first told him you wanted it shipped in bales?

A. I am not sure. I mentioned—I remember Mr. Piersol discussing it with me, whether I wanted it in rolls or bales, and we decided bales were more satisfactory; that is, I decided bales were.

(Testimony of Leonard J. Mills.)

Q. Would it have been on March 14th you discussed that for the first time?

A. It may have been. It may have been prior to that.

Q. Do you think you discussed it on March 6th?

A. I am not sure. It was not of very great consequence, so long as the mill knew in advance the way we wanted it.

Q. Didn't you subsequently change that and ask it be shipped in rolls?

A. I may have done it. It was of no consequence, so long as the mill knew it before they started putting the material up.

Q. Now, Mr. Mills, I show you what I understand you say was the contract you made with Deering-Milliken, the March 6th letter, with the price in it and all of that, and the March 14th memorandum of order.

I ask you whether or not they differ as to the quantity?

Mr. Lincoff: If your Honor please, I object on the ground that here again this is calling for the conclusion of the witness with respect to documents which speak for themselves.

I might add that the best evidence, whether again there are similarities or dissimilarities, may be ascertained from an examination of the documents.

The Court: Unless it is contended there is an ambiguity in language and such is pointed out to the court, so we can see it, I think the objection is well taken.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Did you tell Mr. Piersol at this time that the minimum width was particularly important to you, 45½-inch minimum width was particularly important to you? [251]

A. I discussed with Mr. Piersol whether it would be possible to have just one width instead of the two widths. There was no question in my mind that it was satisfactory, because it made no difference to the mill, I was sure.

He said no, it made no difference so long as—whichever width I wanted.

I said, “I think I prefer having the 45½-inch width.”

The reason for that change, if you wish to hear it, was so that there wouldn't be any confusion as to what quantity to get in each width in each shipment.

I decided to work with only one width, 45½-inch width.

Q. Now, I ask you again: Did you ask Mr. Piersol to tell Deering-Milliken that it was particularly important that it be not less than 45½ inches?

A. I don't think it was necessary to tell him that. I just told him I would prefer the 45½-inch width.

Mr. Lydick: Well, will you read the question?

Q. (By Mr. Lydick): Will you see if you can answer it yes or no?

Mr. Lincoff: I think, if your Honor please, the question has been answered.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Does that mean no? Does that mean that you did not ask him?

Mr. Lincoff: Your Honor please, I submit that there is an answer which is responsive to the question. [252]

The Court: There isn't any motion to strike out the answer, is there? He is just arguing further with the witness about it.

Mr. Lydick: I asked to have the question read again and prior to that time the other colloquy began. I do not believe the answer was responsive to the question.

The Court: Ask it again.

Mr. Lydick: Read the question.

(The question was read.)

Mr. Lydick: I do not believe the answer that the witness gave was responsive to that.

The Court: Read the question and answer.

(The record was read.)

The Court: Mr. Witness, we don't care what you thought was necessary or unnecessary. We don't want your argument in the case. Your lawyer can argue your case.

The Witness: I am sorry, sir.

The Court: When a question is asked, answer the question. Bear in mind it is a particular inquiry of a particular fact and answer the question and don't make a comment.

The Witness: I asked Mr. Piersol for the 45½-inch width.

(Testimony of Leonard J. Mills.)

Mr. Lydick: I submit again the answer is not responsive.

The Court: The answer may be stricken.

The Witness: I don't recall that I used that exact [253] phraseology. I will tell you what I think I told him. May I tell you then what I think?

Q. (By Mr. Lydick): You may say anything you wish.

A. I believe that I said to Mr. Piersol that I would prefer having a 45½-inch width of this material. I didn't say whether it would be particularly important. That is where I was wondering just what your phraseology was.

Q. It wasn't particularly important to you that it be 45½ inches? If it were a little less than that, it didn't make any difference?

A. Oh, yes, it did.

Q. Oh, it did. I see.

A. I didn't mean I may have told that to Mr. Piersol, if we are going to get into that. That is what I am getting at. I said to Mr. Piersol, "I prefer the 45½-inch width."

Q. Is it that you don't remember whether or not you told Mr. Piersol that the 45½-inch width was particularly important?

A. Mr. Lydick, in that business when you order a width of a certain width there it means that is the minimum of the width. When I ask for 45½-inch width, that is the minimum width. They may give it to you a little larger, a little wider.

When I say, "I prefer having the 45½-inch

(Testimony of Leonard J. Mills.)

width," Mr. Piersol understood it was 45½-inch minimum. [254]

Q. There was no need for you to remind him it should be any less than that?

A. That is right.

Q. Will you look at the March 6th letter and the March 14th memorandum of order and give to me the quantity of goods on the March 6th letter?

Mr. Lincoff: May I ask you identify the exhibit by number? There are two March 6th letters.

Mr. Lydick: Exhibit No. 7. Do they differ on quantity, counsel?

The Witness: I am sorry. Would you repeat your question?

Q. (By Mr. Lydick): Will you read the quantity of the goods on the March 6th letter?

A. Yes. 101,200 yards of 45½-inch goods and 23,900 yards of the 47½-inch goods.

Q. Will you read me the quantity on the March 14th memorandum of order?

A. 126,000 yards of the 45½-inch goods.

Q. Will you read me the terms?

A. On the——

Q. On the March 6th letter.

A. I can read you the March 6th letter.

"This will confirm our quotation to you of today on 101,200 yards of 45½ rayon cartridge cloth in the greige as per Specification PXS-1300 at 36⅛ cents [255] per yard and 23,900 yards of the same material in 47½-inch width in the greige at 37⅜ cents per yard, both on terms of net 30 days,——"

(Testimony of Leonard J. Mills.)

Q. That is enough. I just wanted the terms. The terms are net 30 days, is that right?

A. That is right.

Q. Will you read the terms off the memorandum of order, without reading the entire order, unless you feel it is necessary to explain it.

A. "Net 30 days, 10 per cent with contract."

Q. Will you read me the shipping instructions——

The Court: Counsel, the court wonders where we are getting in having the witness read exhibits and parts of exhibits. Those things are before the court, they being incorporated in any brief, they can be elaborated upon in argument and read. The court can read. I don't need this witness to read for me.

Mr. Lydick: Very well, your Honor.

Q. (By Mr. Lydick): You have a copy of the memorandum of order in front of you?

A. Yes, sir.

Q. Did you ever receive a copy of that yourself?

A. That is what I received.

Q. You presently then have it in your possession, it is your copy?

A. I believe this is the copy I received (indicating). [256]

Q. Do you recollect when you received it? You testified previously you received it March 14th.

A. That is correct.

Q. You note it is dated March 14th?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Was it delivered to you personally or mailed to you? A. I received it in the mail.

Q. March 14th is a Friday, Mr. Mills. You still believe you received it March 14th?

Mr. Lincoff: Your Honor please, I don't wish to protract this, but I think the testimony was in response to my question, "Did you receive it on or about the date it bears," and I think the answer was——

Mr. Lydick: Wasn't it at all. We have that testimony exactly——

The Court: He is entitled to probe into that. He is beginning to ask things that would rest neither in this witness' memory or in documents not yet before us. This is cross examination. What I was objecting to was the reading of the documents. He is doing something else now, which is proper.

The Witness: I am sorry. Are you waiting for my answer?

Q. (By Mr. Lydick): Did you receive this document the same day it is dated?

A. I don't recall. I received this in the mail about the 14th of March. I assume I got it possibly the next day. [257]

Q. Could it have been the following Monday, March 17th?

A. It more likely would. If the mail were prompt it would be on Saturday.

Q. Did you read it when you received it?

A. Yes, I did.

Q. What did you do with respect to it? Did it

(Testimony of Leonard J. Mills.)

correctly state the information you had given to Mr. Piersol?

A. As to the width and quantity.

Q. Is there any portion of it that is incorrect?

A. I believe so. The only error that was in there, that I noticed, was that I believe there was a typographical error in the price which stated $38\frac{1}{8}$ cents instead of $36\frac{1}{8}$ cents.

Q. Did you bring that to Mr. Piersol's attention?

A. I may have. I don't think it was of any importance there. I don't know whether I did or not.

Q. Two cents on a hundred thousand yards—

A. I wasn't being charged that. I believe it was a typographical error.

Q. You don't recall whether you called that to Mr. Piersol's attention?

A. That is right. I don't recall. We had that price set up before this (indicating); this was just a confirmation of it.

Mr. Lydick: I move that portion of the answer be [258] stricken out.

The Court: Strike it out.

Q. (By Mr. Lydick): Was there any printing on the bottom of that memorandum of order?

Mr. Lydick: I object to it on the ground the document speaks for itself, if your Honor please.

The Court: Sustained.

Q. (By Mr. Lydick): Did you read the entire document?

A. I may have, I don't recall.

(Testimony of Leonard J. Mills.)

Q. What portions did you read and what portions didn't you read, if you can recall?

A. I read all the typed part.

Q. You read all the typed part?

A. That is right, sir.

Q. Did you read the printed part?

A. I may have, I don't recall.

Q. Did you make any objection to Mr. Piersol with respect to anything occurring on that document, printed or in writing?

A. I did not.

Q. Price, quantity, widths, terms, delivery, shipping, seconds, printed language at the bottom, you made no objection to any of that?

A. I did not.

Q. During the period March 14th to March 21st, which [259] I believe is the day you testified Mr. Piersol called you to inform you of the difficulty regarding the subject matter, what, if any, discussions did you have with Mr. Piersol?

A. One thing I recall was that he called me at approximately prior to the 20th of March or on the 20th of March, and said he received the request from New York to secure from me a check for the 10 per cent of the goods which the credit manager and I had agreed to my paying in advance.

I immediately made out such a check and brought it over and presented it to Mr. Piersol.

Q. Was there anything else, any other discussions with him of any kind?

A. I can't recall.

Q. Was this deposit ever returned to you?

(Testimony of Leonard J. Mills.)

A. At a much later date, yes.

Q. But you did receive it back?

A. Long after this whole, after correspondence between my attorney and Deering-Milliken attorney at New York.

Q. When was the date you received it back?

A. I don't recall the date I got it back.

Mr. Lydick: Does your correspondence show, Mr. Lincoff?

Mr. Lincoff: I think it does.

Mr. Lydick: I take it we didn't find that other letter, is that correct?

Mr. Lincoff: I haven't been able to find it yet, Mr. [260] Lydick.

Q. (By Mr. Lydick): Did you receive back the same check you had delivered?

A. Yes, I did.

Q. It had not been deposited?

A. No, it had not.

Mr. Lydick: May we go forward and you tell us when you find the correspondence that will help this witness to determine when he got it back?

Mr. Lincoff: Yes, I will be happy to. I have that here. I saw it just a few moments ago.

Q. (By Mr. Lydick): Did he tell you why he wanted, did Mr. Piersol tell you why he wanted the check then instead of as indicated on the memorandum of order, which says "10 per cent deposit with contract"?

(Testimony of Leonard J. Mills.)

A. He said he received a request from New York for the check.

Q. He gave you no reason as to why they wanted it, other than it was stated on the memorandum?

A. I don't know whether they gave him any reason for it, other than the fact I felt they were entitled to it and gave it to them immediately.

Q. It didn't make any difference whether you gave it then or in accordance with the memorandum?

A. No, I can't see what—I can't see what your point is. [261]

The Court: You don't have to see what his point is. You just answer questions as to facts.

The Witness: I am sorry, your Honor.

Q. (By Mr. Lydick): Did you have any discussions regarding samples during this week's period, that is, the 14th to the 21st?

A. Discussion on that, on that 50-yard piece. That took place through that entire period. I don't recall exactly where it started and where it ended.

Mr. Piersol called me, after he first advised me it was going to the Pasadena Ordnance Office a day or two later, or more, he got a call, or, he called me and said he had a TWX from New York advising him that the 50-yard piece they sent to Colonel Heath did not meet—it was not the piece they meant to send, and they did not have the goods to meet the specifications.

(Testimony of Leonard J. Mills.)

Q. Is that what he told you?

A. That is correct. I believe he got a TWX or a phone call; I don't recall which of the two he got from New York, but it was not the goods they intended to send.

Q. Did he tell you in what manner it was not the goods they intended to send?

A. I don't recall.

Q. Isn't it a fact he told you that the piece they had [262] sent was finished and not greige goods?

A. If he had said that, I don't know if that was it, I don't remember. But all I do remember was that the problem immediately came up when I was to get the goods to meet—to get for the pilot run.

Q. You recall what you said to him?

A. That I would immediately get in touch with Colonel Heath and see what could be worked out for the pilot run.

Q. Was there any other conversation whatsoever with respect to this special piece of goods?

A. I can't recall at the moment.

Q. Do you have any recollection of Mr. Piersol telling you that these goods were finished and not greige goods and, therefore, were not the goods that you were going to get?

A. He told me they were not the goods that were meant to be given to me, that I had ordered. I don't recall his saying, explaining why they weren't the goods.

(Testimony of Leonard J. Mills.)

Q. He told you this piece that had been sent was not the goods you had ordered?

A. That is right. That was not the goods that was to be in the order.

Q. Do you recall his telling you they were finished, whereas the goods you ordered were greige?

A. I don't recall whether that was said or not.

Mr. Lincoff: If I may interpose, Mr. Lydick, it appears [263] that under date of April 15, 1952, a letter was sent from Deering-Milliken & Co., addressed to Modern-Aire, in which they state they are returning "your check in the sum of \$4,551.75," and that appears over the signature of J. Calhoun Harris, Vice President, Deering-Milliken Co. Inc.

Q. (By Mr. Lydick): Does that refresh your recollection as to this long after period about three weeks after this difficult first on March 21st, is that correct?

A. I imagine that is the date.

Q. During this period of March 14th to March 21st, did you have any discussions with Mr. Piersol or anyone else at Deering-Milliken with respect to delivery schedules?

A. Other than what I have already testified, I don't recall anything further.

Q. Well, what delivery schedule does the memorandum of March 14th call for?

Mr. Lincoff: That is objected to, if your Honor please, on the ground the document will speak for

(Testimony of Leonard J. Mills.)

itself, if at all, with respect to that or any other item.

Mr. Lydick: It is necessary for a proper presentation for the next question, to ask the next question.

The Court: When you wish to call attention to a particular exhibit, mention it and the clerk will hand the exhibit up.

Mr. Lydick: It is in the hands of the witness, your [264] Honor.

The Court: The court will read it if you ask a question concerning the factual situation reflected in it or that supports it.

Q. (By Mr. Lydick): What delivery does the memorandum of order call for?

A. Every two weeks, starting the 18th of April and earlier, if possible; not later than the 18th of April.

Q. During the period March 14th to March 21st did anyone tell you unless that delivery was changed Deering-Milliken would have to pass up the order?

A. No, sir, no one mentioned that to me.

Q. Did anyone say anything to that effect?

A. I cannot recall any such information.

Q. Was the delivery schedule in fact changed thereafter?

A. I don't recall whether it was or not.

Q. The delivery schedule was very important to you?

A. That is right. At this date, two years later,

(Testimony of Leonard J. Mills.)

I don't recall whether there was a change from that or not. If there was, I would have evidence of that fact.

Q. Where would you have evidence?

A. In my file.

Q. Do you have anything in your file that is evidence of the fact that the delivery schedule was changed between March 14th and 21st? [265]

A. Nothing that I can show for that, I don't believe.

Q. Well, I hate to waste the court's time. Why do you think you would have evidence of that particular fact?

A. It would be a very material point. I can't recall from looking at that there was a change from that. If you can show me there was such a change, I can tell whether it took place or not. I can't recall two years later whether this date was changed.

Q. You don't know of any delivery schedules made during the period March 14th to March 21st?

A. I can't recall it.

The Court: May I ask plaintiff's attorney, was there anything in this situation which bound this plaintiff to take the merchandise? Suppose they had shipped it out to him and the Army had canceled or his place had burned up, or some other consideration, would he have been bound to accept the merchandise.

Mr. Lincoff: I think without question, Judge Tolin.

(Testimony of Leonard J. Mills.)

The Court: Under what particular circumstances?

Mr. Lincoff: Well, sir, I feel there had been a commitment to furnish him with this merchandise whether or not——

The Court: The commitment was a double-edged sword, an obligation on one part to supply and on the other to receive?

Mr. Lincoff: That is correct, sir, and I think the correspondence later will show that Deering-Milliken & Co. [266] constantly advised us **they were** going to hold us liable for damages they suffered. If we brought any litigation there would be counterclaims. That is their opinion.

I think, as a matter of law, there certainly could have been a cause of action for breach of contract.

Whether or not it would have resulted in recovery of damages or whether it would be specific performance is something else again. Certainly there would have been an actionable breach of the contract.

The Court: I was just wondering. Questions come to my mind as I hear this, and if you don't mind I will sometimes ask them without thereby intending any answer——

Mr. Lincoff: I appreciate it. In addition to which, your Honor, the check had been received and held for a considerable period of time.

Mr. Lydick: Much of this testimony, after other witnesses are brought to the stand, will have a bearing on precisely the question your Honor has raised.

(Testimony of Leonard J. Mills.)

I can't at times raise it as easily as you can. I have to bring it out by these other methods.

It will come up in the future, as to whether or not there was such a situation.

Q. (By Mr. Lydick): Now, March 21st, I believe, you testified that Mr. Piersol informed you that our greige goods would meet Specification PA-PD-29, is that correct? [267]

A. That is correct. I would like to explain exactly what Mr. Piersol said and what took place.

Q. All right.

A. On March 21st, I believe the date was, Mr. Piersol called me on the phone——

Q. Excuse me. Did you have more than one conversation with him that day?

A. I don't recall. I recall this incident very distinctly.

Q. Do you recall whether you had more than one conversation with him?

A. I possibly did, after I spoke to—yes, I did. I spoke to him on the phone——

Q. Will you keep them in chronological order, as to what he said in his first one and what you said, and what he said in the second one and what you said?

A. I will do my best. I had gotten a call from Mr. Piersol advising me he had gotten a TWX from New York, and he read it to me on the phone, the substance of which was that the mill could not meet the specifications, the porosity in time to meet delivery.

(Testimony of Leonard J. Mills.)

Q. Beg your pardon. That was your impression of what the substance of it was?

A. The TWX was here.

Mr. Lydick: I would offer it. I am sure it would be [268] objected to.

Mr. Lincoff: It is in evidence. I will be happy to let you show it to him.

The Witness: I will be glad to read it.

The Court: If you want me to read it, just say so, and the clerk will hand it up.

Q. (By Mr. Lydick): Go ahead and tell us what happened.

A. He read the TWX to me on the phone. I told him I would be over there immediately.

I went immediately over to his office. He showed me——

Q. That is all you said to him in that conversation?

A. That is correct; on the phone.

Q. You said, "I will be right over"?

A. I believe that is it.

Q. Then you went over?

A. Then I went over.

Q. This is the second conversation?

A. Yes. He showed me the TWX and in our conversations there he said to me, "That looks like they won't be able to meet the first delivery of April 18th or 20th on that. Can you do something with the Ordnance Department?"

I said, "I will go over to the Ordnance," and

(Testimony of Leonard J. Mills.)

asked him for the TWX to take with me. He gave it to me. I went over to the——

Q. Was that all there was to that conversation? [269]

A. Possibly at that time or when I spoke to him later in the day, he spoke of my—we discussed our getting it from another source.

Q. What else happened at that conversation, if anything, that you remember?

A. Well, Mr. Piersol told me to take—I said, “I will take it over to the Ordnance Department and see whether they can get either a delay in the delivery date of that first shipment to the Government,” or if I could get the goods from another source for that first portion.

Q. It was at this second conversation?

A. That is right. That was for approximately 20,000 yards. I went over——

Q. Did you have any other conversations at that second time?

A. In his office there? I think that covered it, substantially. I am not sure.

Q. Did you discuss at all what the teletype meant? A. Yes.

Q. Did you tell him what you thought it meant? Did he tell you what he thought it meant?

A. I didn't tell him what I thought it meant; he told me what he thought it meant.

Q. What did he tell you he thought it meant?

A. They would not be able to meet that first

(Testimony of Leonard J. Mills.)

delivery [270] of 20,000 yards by the delivery date it was scheduled.

Q. May I show you the teletype. It is Exhibit 11.

On either the first or second conversation you had with Mr. Piersol on this 21st of March, did you have any further discussion of this teletype, other than you have testified? A. No, sir.

Q. Did you have any discussion of the meaning of the first sentence there? Did he tell you what that first sentence meant? You read it, if you wish.

A. "Regarding Modern-Aire Spec Calls For Minimum Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed on Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Spec."

Q. Did you have any discussion whatsoever regarding that particular sentence?

A. Nothing, other than what I testified.

Q. What does the second sentence say?

A. "In Order To Correct This Would Require Too Long a Time and We Be Unable To Meet Delivery Do Everything Possible To Have Customer Accept."

Q. As I understand your testimony, you did have some discussion regarding that phase of it, because you and Mr. Piersol both thought that referred only to the first portion of the contract.

A. That is correct. [271]

Q. Was there any other conversation with regard to that second sentence?

(Testimony of Leonard J. Mills.)

A. No, not at that time.

Q. How about the third sentence?

A. There is no third sentence. That is the end.

Q. "Do Everything——"

A. "Do Everything Possible To Have Customer Accept."

Q. He didn't say anything about it?

A. Other than to go over to the Ordnance and get——

Q. After you went over to the Ordnance——

Mr. Lincoff: Had you finished your answer, Mr. Mills?

Mr. Lydick: Excuse me. I thought you had.

The Witness: Other than to go over to the Ordnance and see if I could get a delay in the first commitment delivery to the Government or see if I can purchase the approximately 20,000 yards from another source to complete that portion of it.

Q. (By Mr. Lydick): Does that complete your answer to that question? A. That is right.

Q. After you had gone over to the Ordnance, did you have any further conversations with Mr. Piersol?

A. When I did—I passed on to him the information I got from the Ordnance Department.

Q. What did you say and what did he say? Where, first, [272] was the conversation?

A. I believe I spoke to him on the phone or in person—I am not sure which—when I got through with Ordnance. I may have called him. I

(Testimony of Leonard J. Mills.)

may have been over there in person, I can't quite recall.

But I told him that the Government could not delay the initial delivery schedule, that they got in touch with their representative in Joliet and from them learned the source of other mills where other contractors for this item were securing their goods. They gave me the name——

Q. You told all this to Mr. Piersol?

A. That is right.

Q. Very well.

A. They gave me the name of Paul Whitin mill, for one, a Mr. Lundy as their representative.

Q. Did you tell Mr. Piersol that?

A. Yes, I did.

Q. Very well.

A. I got in touch with Mr. Lundy that very same afternoon. I believe he was in Chicago at the time, just about ready to call on the Joliet office, and I learned from him I could secure that 20,000 yards, approximately in not the same width, but in a similar width, or, rather, another width. But that the goods would cost me \$1,600.00 more for just that 20,000 yards. [273]

Q. Did you tell Mr. Piersol all of that?

A. I did, because Mr. Piersol then told me that was fine. That was the expression he used. He would pass that information on to New York and see what they said.

Q. Did Mr. Piersol say anything else, other than

(Testimony of Leonard J. Mills.)

that, during this entire conversation that you can remember? A. I don't recall.

Q. That is all he said in this third conversation?

A. That is right.

Q. Did you have any other conversation with Mr. Piersol that day?

A. I don't believe so.

Q. Did Mr. Piersol at any other time give you any other explanation than the ones you have already testified to, with respect to this teletype?

A. That day?

Q. Any time.

A. Well, yes, the next day or day after the next he called me to advise me that he got an answer to that message that he phoned to New York, saying it would cost \$1,600.00.

Q. March 22nd or 23rd?

A. That is right. In which they advised him——

Q. Saturday or Sunday?

A. Well, as I say, it may have been Monday. But it was the business day following the day that I spoke to him. [273-A] In which they advised him that they could not meet the specifications for the contract, as a whole; not just for the first delivery.

Q. It wasn't the same day, though, that wasn't March 21st?

A. It wasn't the same day. He TWX'd the \$1,600.00 question to them and the following business day, I will put it that way, he got the answer and called me with that answer.

Q. It couldn't have been the same day?

(Testimony of Leonard J. Mills.)

A. No, sir, it wasn't, because late in the afternoon, by the time I got—called him from Pasadena or got through with the Ordinance in Pasadena——

Could I have a two-minute recess?

The Court: The witness wants a recess. The witness said, "May we have a two-minute recess?"

It is difficult to keep recesses to two minutes. We will do the best we can.

(Short recess taken.)

Mr. Lydick: May I have Exhibits 9 and 10?

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Please, would you just take a quick look at that letter, because I think it will be necessary to follow the examination.

A. (Witness complies.)

Q. Now, Mr. Mills, on March 20th you say you received this letter. [274]

A. I am sorry.

Q. Plaintiff's Exhibit No. 10.

A. That is right, on March 20th I received this letter (indicating).

Q. Did you receive it in hand?

A. In hand.

Q. At Mr. Piersol's office?

A. That is correct.

Q. At the time you delivered the check?

A. That is correct.

Q. Did you have any conversations with Mr. Piersol at that time?

A. I cannot recall any.

Q. Do you recall anything you said to him at all with respect to that letter?

(Testimony of Leonard J. Mills.)

A. I do not recall anything.

Q. Did you ask for the letter?

A. This was a receipt for the check I gave him.

Q. Is that the purpose of the letter, so far as you are concerned, just a receipt?

A. Yes, I believe that it is. That is the way it reads.

Q. Did you say anything at all to Mr. Piersol regarding the letter?

A. I do not recall anything.

Q. Did he say anything to you at all regarding the [275] letter? A. I do not recall.

Q. You had your conversations with the Whitin Company representative while you were at the Pasadena Ordnance Office. Did they quote you on greige goods or finished goods?

A. They quoted me on goods to meet Specification PA-PD-29.

Q. Did you have any discussion with them with respect to whether or not those were greige goods or finished goods?

A. The only discussion I recall was it was cartridge cloth as to Specification PA-PD-29.

Q. Will you tell me what you said and what the Whitin representative said?

A. It is difficult to recall the exact words. I received a quotation on those goods as per those specifications.

Q. Did you have any conversation with respect to those, whether or not what he was quoting you

(Testimony of Leonard J. Mills.)

was with respect to greige goods or finished goods?

A. I don't recall.

Q. You have no recollection?

A. No, other than the fact it was the goods I needed to meet those specifications.

Q. It was after you learned from Mr. Piersol that Mr. Piersol's greige goods would not meet the specifications? A. That is correct. [276]

Q. You don't know whether you got a quotation on greige goods or finished goods when you talked to the Whitin representative?

A. No. All I called for at that time—I didn't know why it didn't meet specifications PA-PD-29.

Q. You read the teletype?

A. Yes, but that didn't say whether it was greige goods or not.

Q. Really? "Re Modern-Aire Spec Calls Per Min Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Spec."

So it did say "greige," didn't it?

A. Yes, but I do not know that "greige goods" cannot meet that porosity.

Q. You have no recollection of making any inquiry to the Whitin representative, as to whether or not he was quoting in the greige or finished.

A. No, just so long as they met the specifications.

Q. Did he make you a quotation?

A. He did.

(Testimony of Leonard J. Mills.)

Q. On greige goods or unfinished goods?

A. On goods as per specification.

Q. He made no mention to you as to whether, or not they were in the greige? [277]

A. No, sir. He was recommended to me as supplying that fabric to other mills, to other processors.

Mr. Lydick: I submit the answer already is not responsive.

The Court: Stricken. If you wish to have the question read again, you may.

(The question was read.)

The Witness: He did not.

Q. (By Mr. Lydick): He did not?

A. No.

Q. Do you have any recollection whatsoever of having called Mr. Piersol, after you talked to Mr. Whitin's representative, and telling Mr. Piersol that the Whitin representative told you their greige goods would meet the specifications?

A. I don't recall whether I said that.

Q. Do you recall saying anything to that general effect?

A. I only recall that I told Mr. Piersol that the Whitin representative can supply me with the goods. It will cost me sixteen hundred—

Mr. Lydick: I submit the answer is not responsive. I submit that is one reason this examination has been so long.

The Witness: Will you repeat the question?

(The record was read.)

(Testimony of Leonard J. Mills.)

The Witness: I did not recall.

The Court: The answer is stricken. Mr. Witness, I wish you would bear in mind what the court has suggested to you, [278] as to what is proper and improper in connection with answering questions.

You are supposed to answer questions. If you have other information which might be of interest in connection with it, at the next recess bring it to the attention of your attorney and he will have a chance to ask you on redirect.

Q. (By Mr. Lydick): Did you ever ask the Whitin representative for a quotation on the total amount of goods you needed?

A. At a later date.

Q. Did you receive a quotation?

A. I did, sir.

Q. In writing?

A. I believe I may have. I believe it may be in the files there. I have several telegrams from them.

Mr. Lydick: Shall we wait for it, counsel, or will you bring it to our attention?

Mr. Lydick: I will bring it to your attention.

Q. (By Mr. Lydick): Do you recall what their quotation was? A. I do not offhand.

Q. Do you recall how much later you asked for this quotation?

A. After Mr. Piersol advised me the mill had no intention of supplying the goods on our contract at all. [279]

Mr. Lydick: I ask that answer be stricken on

(Testimony of Leonard J. Mills.)

the ground it contains a conclusion, "on our contract."

The Court: He is attempting to give you a time, counsel, by relating it to an event. Insofar as it attempts to classify the contract as an administration to perform under a contract, it will be disregarded, but it will be deemed to relate to a conversation on that subject which was properly referred to.

Mr. Lydick: Thank you. I withdraw that question. Proceed.

The Witness: I am sorry.

The Court: Everything after "supplying the goods" will be stricken.

The Witness: After supplying the goods I made inquiry of the Paul Whitin Company on the quotations on the entire amount.

Q. (By Mr. Lydick): Does that mean by "after," a week after or what after Mr. Piersol told you that?

A. After Mr. Piersol told me that, I then went to the Ordnance Department. They, in turn, suggested I contact these three other mills for quotations.

Q. With respect to the total quantity?

A. For the total quantity.

Q. What were the three other mills?

A. Paul Whitin, for one. I don't recall the names of the other two. [280]

Q. Were they local?

A. No, they weren't.

Q. What part of the country were they in?

(Testimony of Leonard J. Mills.)

A. Well, Paul Whitin, I know, was in Massachusetts.

Q. I am after the other two.

A. I don't recall. Some place back East, whether it was the south or northeastern part I don't recall.

Q. You have written quotations from them on the total amount?

A. I don't believe I have written quotations from them. The quotation I got from Paul Whitin was the lowest of the three.

Q. How do you think you received the other quotations? A. I don't recall.

Q. Telephone?

A. I believe I wired them and I may have gotten a wire back; I just don't recall.

Q. Do you have the wire?

A. I don't recall that.

Mr. Lincoff: If I may interject, I think I can save a little time. I have letters from J. P. Stevens, Inc., from Iselin-Jefferson Co., Inc., in which there are quotations of prices and other matters inquired about.

The Witness: Was that of the date after the 21st of March? [281]

Mr. Lincoff: Yes.

The Witness: Those are the other two.

Mr. Lydick: Would you care to give these to your client, so he can refresh his recollection?

Mr. Lincoff: Yes. Go ahead. Use them any way you wish, Mr. Lydick. That is perfectly all right.

Q. (By Mr. Lydick): With respect to those,

(Testimony of Leonard J. Mills.)

did those in any way, from your files, refresh your recollection as to names of companies you contacted after Mr. Piersol said they did not intend to deliver, if he told you that?

A. I am sorry. Would you repeat that, please? I was reading.

Mr. Lydick: Strike the question. I will ask it again.

Q. (By Mr. Lydick): Do these letters refresh your recollection in any manner as to those persons you contacted for quotations on the total amount of goods you needed, after Mr. Piersol told you that he was not going to deliver these goods as you desired them?

A. Yes, sir, it does.

Q. Whom did you contact?

A. J. P. Stevens & Co. and Iselin-Jefferson Co.

Q. When did you contact J. P. Stevens & Co.?

A. I don't recall. Shortly after the 22nd or 23rd of March, or thereabouts, that I contacted all three.

I received these quotations from J. P. Stevens. One [282] dated April 4th, and one from Iselin-Jefferson dated March 31st.

The Paul Whitin quotation was lowest of the three.

Q. Was lower than the J. P. Stevens quotation?

A. That is correct.

Q. Lower than the Iselin-Jefferson quotation?

A. That is correct.

Q. Do you recall how much lower?

A. I do not. I can better tell you how much

(Testimony of Leonard J. Mills.)

more the Paul Whitin Company price was over the Deering-Milliken price.

Q. Can you? A. Yes.

Q. What was the Paul Whitin price?

A. It came to approximately \$10,000.00 more for the entire——

Q. Can you tell me in cents per yard?

A. No, I can't. I don't recall the exact cents, but in computing it, it came to approximately \$10,000.00 difference.

Q. You still testify, however, that the Paul Whitin price was lower than these two?

A. That is correct.

Q. Yet it came to \$10,000.00 more?

A. That is correct.

Mr. Lincoff: May I inquire of counsel, does he wish to [283] offer these in evidence, the two letters?

Mr. Lydick: No.

The Court: They have been referred to sufficiently here they should be given an identification number.

Mr. Lydick: I merely used them so the man could refresh his recollection from his files, your Honor. I have no desire to offer them in evidence.

Mr. Lincoff: We will be happy to offer them at the appropriate time.

The Court: Mark them for identification. There has been enough use of them here, while it doesn't seem too appropriate to take them into evidence at this moment, they should be marked for identifica-

(Testimony of Leonard J. Mills.)

tion so if further reference to them is made it can be tied back to the immediately given testimony.

Mr. Lydick: I would not offer them in evidence. I would object to their introduction in evidence. If they are marked for identification, that is satisfactory.

The Court: They are simply being ordered marked for identification at this point.

Mr. Lincoff: They may be marked as plaintiff's next in order for identification. I have no objection.

The Court: I don't think as it stands at present they will be admissible.

Mr. Lincoff: No, they would not.

The Court: If they become admissible they should be [284] considered in the light of the testimony just given.

The Clerk: The letter of April 4th, Plaintiff's Exhibit 15. And the letter of March 31st, Plaintiff's Exhibit 16 for identification.

(The documents referred to were marked Plaintiff's Exhibit Nos. 15 and 16 for identification.)

Q. (By Mr. Lydick): When was the next conversation you had with either Mr. Piersol or anyone else during that time?

A. There were any number of conversations. I can't recall just when the next one took place.

Q. With whom did you have further conversations?

A. Well, I spoke to Mr. Piersol several times. He advised me there was nothing he could do about

(Testimony of Leonard J. Mills.)

it, that he got his information from New York and he could only follow out what they instructed him to do.

I went over to the Ordnance Department on a number of occasions, to see what they could do for me.

Q. I want your conversations with people of Deering-Milliken, Mr. Mills.

A. That is all I can recall.

Q. Did you have any conversations with Mr. Harris during that time?

A. Mr. Drake of the Ordnance,—

Q. Did you have any conversations with Mr. Harris?

A. I believe that I did. I am not sure whether I had [285] them—I know Mr. Drake did. I don't know whether I, in turn, spoke to him.

Q. What did you say and what did he say?

A. I can't recall.

Q. When were these conversations?

A. After this came to pass.

Q. You can't recall anything of what you said and what he said?

A. Other than the fact that they didn't intend to fulfill their contract. I can't recall just what it was.

Q. You say Mr. Drake had some conversations with him?

A. Yes, Mr. Drake did call Mr. Harris, to see if he could, acting for the Government to see if he

(Testimony of Leonard J. Mills.)

could get Deering-Milliken to live up to the contract.

Q. Is there anything else you recall of Mr. Drake's conversation? A. Yes.

Q. These were about the same time chronologically, the ones you had with Harris and the ones Drake had with Harris?

A. I believe Drake spoke to Harris after I did, if I spoke to Harris. I am a little bit confused whether I spoke with Harris personally or not. I am not sure of that.

Q. Did you talk to him on the phone?

A. It was on the phone if I spoke to him.

Q. But you can't recollect any more than you have [286] already told us about such a conversation, if there was one?

A. I can recollect the conversation Mr. Drake had.

Q. You can't recollect anything about the one you had?

A. No. It didn't do—didn't serve my purpose.

Q. Did Mr. Piersol tell you that Deering-Milliken expected you to finish the goods at all times?

A. He never told me that.

Q. He never told you that? A. No, sir.

Q. I understand the contract you had with the Government was a negotiated contract, is that correct? A. That is correct.

Q. What items did the negotiation cover?

Mr. Lincoff: Objected to, if your Honor please, on the ground the contract is in evidence and is the

(Testimony of Leonard J. Mills.)

best evidence, and will speak for itself with respect to all matters therein contained.

Mr. Lydick: If there is anything in the contract at all, with respect to negotiations, I would be most happy to refer to them. All they refer to is conclusions.

Mr. Lincoff: I respectfully submit the parol evidence rule would apply.

The Court: Let's see the exhibit.

Mr. Lydick: Exhibit 12.

The Court: The court isn't going to take any witness' [287] interpretation on a document such as this, except to explain any ambiguity or to explain any words or phrases which have a particular meaning in a particular area of activity contracted upon.

Mr. Lydick: Your Honor please, I have no intention whatsoever of examining this witness with respect to any matter that is contained in that contract. That contract was a negotiated contract, he just testified.

I presume the negotiations must have covered the period December 18th to March 14th, the date it was signed. By his own testimony it started December 18th. I wish to inquire with respect to portions of those negotiations.

The Court: Negotiations emerged into the contract——

Mr. Lydick: Not from my point of view. It may be between Mr. Mills and the Government, your Honor, but not from my point of view in determin-

(Testimony of Leonard J. Mills.)

ing what was said at these negotiations and what was done as those may relate to matters said and done with respect to us.

The Court: I will conditionally admit such testimony then, and trust to you in your brief to point out the propriety of giving it consideration and where it relates to the particular controversy we have.

Mr. Lydick: It will be tied up before my examination is completed, your Honor.

The Court: You don't have to do it before the examination. [288] But you are going to brief this case, I understand. When you brief the case point out wherein the testimony you are now going to adduce bears some relevancy or materiality and is within the rules of evidence.

Now, it is a quarter of 5:00. We have held over a little longer than my usual adjournment time.

It appears that there is some possibility the case set for trial here at 10:00 tomorrow, which I would call for the impanelment of the jury for, might not be tried. There is no assurance to that, unfortunately. But if you want to come in at 10:00 we may be able to take you at 10:00 or within a very few minutes afterward.

If you want to wait until 11:00, we will expect to get a jury impaneled by 11:00 in this case.

What do you want to do?

Mr. Lincoff: We would suggest 11:00 o'clock.

The Court: 11:00?

Mr. Lydick: Yes.

The Court: All right. This particular case is recessed then until 11:00 a.m. tomorrow.

(Whereupon, at 4:45 o'clock p.m., Monday, November 23, 1953, an adjournment was taken until Tuesday, November 24, 1953, at 11:00 o'clock a.m.) [289]

Los Angeles, Tuesday, Nov. 24, 1953, 11:00 a.m.

The Court: Proceed.

Mr. Lydick: Thank you, your Honor.

Will you take the stand, Mr. Mills, please?

Your Honor please, Colonel Bready of the United States Army is here in response to a subpoena directed to him yesterday afternoon, asking him to bring in all the records and files of the Department of the Army with respect to negotiations with Modern-Aire.

The Colonel points out and will point out to the court that the subpoena is in such form, in that it is so general that if he were to ask permission of the Judge Advocate General's Department, on the basis of that subpoena, it would be a long, long time, if ever, before we got what we wanted, which is the final record of the submission by Modern-Aire of California.

He points out, however, if we will issue a new subpoena asking specifically for what we want, which we now know to be in a specific set of files, the files are in different locations, and he believes he could possibly get permission to bring that in to the court.

Therefore, what I would like to do is prepare a subpoena in the proper form and the Colonel is

willing to accept service of it here this morning, and will then, I believe, cooperate with us to the extent of teletyping to the Judge Advocate's [293] Department to receive permission to bring into court that particular portion of the Government's file.

Is that satisfactory with the court and counsel?

The Court: It is satisfactory. I don't think we ought to use court time on those things that must be done in the court, such as the taking of evidence. Is it agreeable for the Colonel to remain here until noon——

Mr. Lydick: I have other counsel with me who will prepare the subpoena. I would like to do that so the Colonel could be excused, if that is satisfactory to your Honor.

The Court: Yes, that is certainly satisfactory.

Mr. Lydick: Is that satisfactory to counsel?

Mr. Lincoff: Plaintiff has no objection.

Mr. Lydick: Colonel Bready, I have discussed with the court the problem regarding the subpoena. I have the court's permission to prepare a new subpoena and effect service on it, and we understand the Department of the Army will at least cooperate to the extent of transmitting it to the Judge Advocate Department in as rapid a fashion as possible, to get permission to bring in the files we need.

Col. Bready: May it please the court, we are more than anxious to cooperate. As soon as I have the subpoena I will communicate with the Judge Advocate General's Office.

Mr. Lydick: May I have a two-minute recess to instruct my co-counsel? [294]

The Court: Yes. Thank you, Colonel, for coming in and for your willingness to cooperate.

I have found in my experience that usually if you will avoid getting into material of a high order classification, that that which has one of the lower order classifications will be provided if the parties will just let the Military know what they want.

Col. Bready: Yes, sir. We recognize the other difficulty, that the parties have some difficulty in knowing just what they do want, due to not knowing all our internal affairs. We will cooperate as much as we can.

The Court: Thank you very much. If you gentlemen want a place to confer, the bailiff will show you back to our law clerk's room or the witness room, and you may use that facility to work this problem out.

Mr. Lydick: Just five minutes.

Mr. Lincoff: May I address the court before you take your recess?

Mr. Lydick, in the interest of ascertaining what the entire facts are, may I inquire through the court what counsel proposes to have the witness produce, pursuant to subpoena?

I believe if there is only going to be a production of a partial file, I think that would be eminently unfair. I think the Colonel should be instructed by the court, and the subpoena should be broad enough to require him to produce such documents [295] as will present to the court an entire picture.

If there is one document referred to in the subpoena or if there is an answering letter or a corol-

lary to it, I think that file should likewise consist of those documents.

The Court: The court can't rule in advance upon the admissibility of evidence. We just trust to counsel, as being reasonable men, to see they ask for that which will be admitted.

We will appreciate the necessity of bringing in sometimes replies to letters and such other documents. Otherwise, we will have to have extended protracted revisits to the Colonel, and you can make a nuisance of yourself doing that. Since he is in a cooperative spirit, as the court thought he would be when I made the suggestion the other day, I think it would well behoove counsel to keep him that way.

Col. Bready: May it please the court, I am more than happy to cooperate with the plaintiff, as well as the defendant.

Mr. Lydick: If your Honor please, we particularly desire the records and files of the Department of the Army with respect to the final negotiations between Modern-Aire and the Department of the Army, and particularly the final cost submission.

The Court: Is it going to be of any considerable advantage if we simply recessed this matter until 2:00 o'clock, and either your joint or your separate conversations with the Colonel can be continued and you can get this matter and what documents you want settled? [296]

Mr. Lydick: I would suggest that perhaps we could hold a joint conference with the Colonel, and

if there is a disagreement between counsel and me about which was desired, I could serve a subpoena I desired and he could serve the one he desired.

The Court: The court came to the bench about the middle of a sentence in a memorandum that I am writing. If you would rather do that, I am in a receptive mood to taking up this afternoon.

Mr. Lydick: May I request a recess until this afternoon?

The Court: That will be granted. However, it is granted with a hope this will lead us where we won't have to work on this case on Friday. That is a hope. It is not a directive.

Mr. Lincoff: Your Honor, I would like to make a statement for the record, that I think I speak on behalf of all parties, and that I hope that regardless of what transpires we don't have to work on Friday. I don't know what the court's intention is in that respect. We will see what we can do with respect to this particular matter between now and 2:00 o'clock.

The Court: Thank you. We will recess until 2:00 o'clock.

(Whereupon, at 11:10 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [297]

Afternoon Session, 2:00 p.m.

The Court: I hope the morning recess of the case was productive of some good.

Mr. Lydick: Your Honor, we prepared jointly a subpoena duces tecum which was designed to best

effectuate a quick presentation to Washington and a possible quick return.

The Colonel indicated to us that three weeks was the normal time for response and two weeks was excellent time. That he would make every conceivable effort, despite the guess that the Pentagon would be closed Wednesday, Thursday and Friday of this week, to have a response from them by Tuesday of next week.

The Court: Don't stall your case waiting for that. When we come to the point where everything is in, we will just recess to some date certain in the future and we will take it up then, at the recessed date.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): Mr. Mills, can you tell me whether or not you gave any estimate of your cost of production of these goods to the United States Government prior to the time you entered [298] into a contract with them March 14th?

A. I did.

Q. Do you have any copies of those estimates?

A. No, sir, I haven't.

Q. Do you have any of the working papers that were used to prepare——

A. I beg your pardon. May I correct that answer? I haven't any copies of the 105 mm.

(Testimony of Leonard J. Mills.)

Q. You have copies of the 75—— A. Yes.

Q. That is the one you entered into?

A. The 105 is the one I entered into, that is right.

Q. Do you have any work papers from the estimates that you produced, that you used in making up those estimates?

A. All I have of the 105 mm contract, which is the sheet which I showed to you, which is a compilation of my figures prepared since we entered into this discussion with Deering-Milliken.

Q. By that you mean since you entered into this litigation?

A. Litigation, that is correct.

Q. Was it necessary for you, during your negotiations with the Government, to show them the details of your cost of production or estimated cost of production?

A. Yes, sir, it was. [299]

Q. Those cost figures were submitted to the Government in writing? A. That is correct.

Q. Did they change from time to time? That is, was there more than one submission with respect to the 105 mm contract?

A. There was a change. It was an increase in price on the 105 mm, yes, sir.

Q. Increase in price of your cost?

A. No, an increase in the price the Government gave me.

Q. Other than that, in your cost submissions, there were no changes?

(Testimony of Leonard J. Mills.)

A. No there was only one set of figures I submitted to the Government.

Q. Those were the ones that were accepted?

A. That is right.

Q. Do you recollect what the final cost figures were that you submitted?

A. You mean in dollars and cents, sir?

Q. Any way they were submitted, Mr. Mills.

A. Well, they were approximately \$13,000.00 less than the contract price of \$70,000.00.

Q. Do you recollect what your percentage of profit was that was shown in those submissions?

A. Am I correct in your prior question to this, as to [300] what my cost figures were, or as to what they were when I submitted them to the Government in the beginning?

Q. I wanted to know if you recollect what figures you submitted to the Government. You say you have no copies of them. I am trying to find out if you have any recollection.

A. I wish to change my prior answer.

Q. Oh.

A. My figures that I submitted to the Government originally, I don't recollect in dollars and cents what they amounted to now.

Q. Do you happen to recollect the percentage of profit figure you were allowed therein?

A. Yes.

Q. What figure was that?

A. The Government allowed me seven per cent

(Testimony of Leonard J. Mills.)

profit on both proposals, on the 75 and 105 mm, which amounted to \$14,000.00, approximately.

Q. Do you recollect what the percentage of profit was they allowed you in the final submission you gave to the Government on the single contract that you finally obtained?

A. There were no additional submission of figures, sir. My final price on the contract was approximately \$70,000.00, which results in an approximate profit of \$13,000.00 to me on that one contract.

Q. I am asking you if you recollect from the submission [301] you made at that time what the percentage of the profit was that the Government allowed you.

A. Yes, sir. I said seven per cent.

Q. Was there any separation of the percentage of profit after the one contract that was decided you would not get? In other words, was there a percentage of profit figure on the final contract you did get?

A. Only that, sir, I went back to the Government when they offered me just one contract in place of two and pointed out to them that I would only consider the contract with an increase in price, which would take care of my not getting the other contract.

And I got an increase in price, which brought my profit up to approximately \$13,000.00, which just about equaled the profit that the Government—that was on these proposals, totaling \$14,000.00.

Q. In other words, they were going to allow you

(Testimony of Leonard J. Mills.)

\$14,000.00 profit on both contracts and eventually they allowed you \$13,000.00 profit on one contract?

A. That is correct.

Q. Did you make any copies of your submissions at the time you prepared them for the Government?

A. Of the proposal?

Q. Yes.

A. No, sir. They only give me enough copies to submit [302] to them.

Q. Did you have any working papers from which you prepared those proposals?

A. Yes, sir. I used working sheets.

Q. But you no longer have them?

A. No, sir. I only have them, the compilation, a summary of those working sheets.

Q. When were they destroyed?

A. I don't recall just when they were destroyed.

Q. Before or after the beginning of this action?

A. They weren't destroyed until I had the figures compiled onto the records that I have in my files now.

Mr. Lydick: I move the answer is not responsive to the question, and ask the witness be instructed to answer the question.

The Court: Strike the answer. Miss Reporter, read the question.

(The question was read.)

The Court: Mr. Clerk, when was this action commenced?

Mr. Lydick: August 1952, I believe, your Honor.

The Clerk: August 19, 1952.

(Testimony of Leonard J. Mills.)

The Court: August 19, 1952, Mr. Witness. Now, that question doesn't call for an exact date. It calls for information as to whether the destruction was before or after the beginning of this lawsuit.

The Witness: Yes, your Honor.

The Court: Can you answer it?

The Witness: I am not sure. It was about the time—I am not sure whether it was before that date of August or just after we started corresponding with Deering-Milliken on this contract. It was at the time, though, I made a compilation of all those worksheets, which I now have.

The Court: But you are unable to say whether it was before or after the beginning of the litigation?

The Witness: No, sir, I am not able to say that.

Q. (By Mr. Lydick): You mentioned you had a written compilation which has been prepared since the beginning of this action. Is that correct?

A. That is right.

Q. Do you have that with you?

A. I believe Mr. Lincoff has that.

Mr. Lydick: May I see it?

Mr. Lincoff: Yes. I showed that to you the other day in the hall. This is it here, Mr. Lydick (indicating).

Mr. Lydick: Thank you. In order to conserve the time of the court, Mr. Lincoff, is it agreeable that my co-counsel copy this, so we may inspect it at some leisure instead of having to inspect it now and examining, and perhaps we can recall Mr. Mills

(Testimony of Leonard J. Mills.)

during our case and examine regarding these figures?

Mr. Lincoff: No, I have no objection. Will you kindly [304] have it marked for identification?

Mr. Lydick: Your Honor please, I present this document for identification only.

The Clerk: Plaintiff's exhibit?

Mr. Lincoff: Plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit 17 for identification.

(The document referred to was marked

Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Lydick): Mr. Mills, did you ever produce any of the cartridge liners that were called for under this contract, either before or after you entered into the contract?

A. No, sir, I did not.

Q. Did you have any assistance by way of time studies in the preparation of your original computation for the Government or in the preparation of these computations?

A. Yes, I had the assistance of a qualified industrial engineer.

Q. His name? A. Mr. Henry Levor.

Q. And his address?

A. I haven't got his address offhand. I have his telephone number.

Q. Will you give me his telephone number?

A. Yes. STate 4-7541.

Q. What time did he help you? [305]

A. At the time I was figuring on the contracts

(Testimony of Leonard J. Mills.)

that were, the proposals that the Government had offered me.

Q. Which was prior to March 6, 1952?

A. Yes, sir, it was prior to then.

Q. And after December 18, 1951?

A. That is correct.

Q. Have you seen him since that time?

A. I am not sure if I had. I may have. I have talked to him since then.

Q. How recently have you talked to him?

A. Just a short time ago.

Q. A matter of days?

A. A matter of a week or so.

Q. A week? A. Yes.

Q. Did you discuss with him this action at the time you talked to him?

A. I advised him of what was taking place.

Q. Have you had any other assistance, other than that from Mr. Levor?

A. None that I can recall at the moment.

Q. Did the man whom you advised me at the deposition you employed as a foreman give you any assistance along these lines?

A. In my costs? [306]

Q. Yes. A. No, sir.

Q. Was he going to give you assistance of any kind?

A. Well, he was going to be my foreman once we got into production.

Q. Since you didn't get into production he didn't do anything about those liners?

(Testimony of Leonard J. Mills.)

A. He was employed by me for a period of time. We were getting the plant set up for production.

Q. What was his name?

A. I can't recall at the moment. I can find it.

Q. Did you pay him a salary?

A. Yes. I paid him a salary. I have his name and records. I just can't recall it at the moment.

Q. Will you bring it to court at the next court appearance?

A. I will. I will be glad to.

Q. When were you first aware that Deering-Milliken did not intend to deliver to you greige goods that would meet Specification PA-PD-29?

A. When Mr. Piersol called me on March 21st.

Q. When did the Government terminate your contract for failure to perform?

A. I am not certain of the date, sir. The letter is in my files. [307]

Q. Is that the letter of June 2, 1952?

A. It may be. I have the letter. I just don't recall the date.

Q. There is an exhibit, Mr. Mills, which is placed in evidence, Plaintiff's Exhibit 14, which is entitled "Notice of Termination for Default June 2, 1952." Is that the date you received notice of termination for default?

A. That is approximately the date.

Q. Could it have been a day or two after that, because of mail?

A. Yes. I had been advised prior to that I was going to receive it.

(Testimony of Leonard J. Mills.)

Q. Yes. That was the date of the formal notice?

A. That is correct.

Q. What did you do, if anything, during the period March 21, 1952, and June 2, 1952, with respect to obtaining the goods you required in order to permit you to perform your Government contract, from other sources?

A. I contacted other sources and attempted to get the goods from other sources. I also——

Q. Whom did you contact?

A. Paul Whitin & Company, for one.

Q. Yes.

A. J. P. Stevens & Co. and Iselin-Jefferson & Co.

Q. Are those precisely the same contacts you testified [308] to yesterday?

A. I believe so.

Q. Were there any others besides those three?

A. If there were, I don't recall who they were.

The Court: Were any of those three able to supply you or did they offer to supply you at any price?

The Witness: Yes, they all offered me goods. They weren't able to meet the delivery schedules as set up by the Government.

But the price they offered also was considerably in excess of the price I was to pay Deering-Miliken.

Q. (By Mr. Lydick): Did you make any effort whatsoever to obtain another or different delivery schedule from the Government?

A. No, sir, because of the fact at the time the

(Testimony of Leonard J. Mills.)

Government—the Ordnance Department at Pasadena was also attempting to use pressure from Washington to get Deering-Milliken to fulfill their contract.

Mr. Lydick: Your Honor please, I ask the answer be stricken as not being responsive and to have the question read.

The Court: Except for the answer “No, sir” the answer is stricken. The “No, sir” may stay in.

Mr. Lincoff: I do not wish, your Honor, to dispute your Honor’s ruling. I respectfully submit, your Honor, that the answer is one which, following the word “No,” constitutes an [309] explanation of the part of an effort and the result of the effort to obtain merchandise otherwise, or an explanation of why he did not obtain it at another place. I appreciate that I can establish it on redirect, but I think it is responsive to the question, your Honor.

Mr. Lydick: Your Honor please, I think it was simply a conclusion of the witness as to some things which he thinks might have occurred. I don’t know they did. He doesn’t know they did. It is probably based on hearsay. Anyway, it isn’t responsive to the question.

The Court: Anyway, the court has stricken it. It is a proper area of inquiry on redirect.

Mr. Lydick: Thank you, your Honor.

Q. (By Mr. Lydick): Now, when was the last inquiry you made to anyone in an attempt to obtain these goods from other sources? Was it one of these

(Testimony of Leonard J. Mills.)

three attempts which you have answer in writing for, except for Paul Whitin?

A. I am sorry, I didn't hear the final part of your question. I didn't follow it.

Q. I will rephrase it. It was compound and not a good question, Mr. Mills.

When was the last time you made an attempt to obtain these goods from any other source?

A. About the time I received the answer from Paul Whitin and Iselin-Jefferson, and J. P. Stevens; I got their [310] quotations.

Q. The quotations you refer to are those quotations in writing that were discussed here yesterday?

A. They were confirmed in writing, yes.

Mr. Lydick: If I am not mistaken, those letters were introduced for identification only. Is that correct, Mr. White?

The Clerk: Yes, sir.

Mr. Lydick: Could I see them just to confirm the dates on them?

The Clerk: Yes.

Q. (By Mr. Lydick): The letter from Iselin-Jefferson is dated March 31, 1952, and the letter from J. P. Stevens Company is dated April 4, 1952. Does that seem approximately correct to you, as being around the time you received them?

A. That is about the time I received the letters, yes.

Q. Between April 4, 1952, and June 2, 1952, what efforts, if any, did you make to secure this cloth from any other source?

(Testimony of Leonard J. Mills.)

A. I can't recall of any other efforts.

Q. What, if you know, had to be done to make the cloth that Deering-Milliken was offering you meet the Specification PA-PD-29?

A. I am not—I don't know just what had to be done.

Q. Were you told what this required?

A. Yes, I believe I was told what was to be required.

Q. Were you told by someone a party to this action or—— [311]

A. I was told by Mr. Piersol.

Q. What did he tell you would have to be done?

A. He said the mill advised him the goods had to be scoured in order to meet the porosity specification.

Q. What did he tell you, if he did tell you, would be the cost of that?

A. I don't believe he gave me a figure on the cost.

Q. Did you make any inquiry as to what the cost of scouring would be?

A. No, sir. I was advised what the cost of the scouring would be indirectly, if you wish to hear how.

Q. From what source?

A. From the Ordnance Department, who got the information from Mr. Harris, the vice president of Deering-Milliken.

Q. What was that figure?

A. Approximately three cents a yard.

(Testimony of Leonard J. Mills.)

Q. Did you make any effort whatsoever to obtain or locate facilities in the Los Angeles area that would scour the cloth for you?

A. No, I didn't know what facilities would be required.

Q. You had no sufficient knowledge of the term "scouring" to know what would be required for that?

A. That is correct.

Q. Did you make any inquiries from anyone as to what would be required in a scouring operation or who might perform [312] that kind of operation in this area?

A. No, sir, I did not.

Q. Did you read your contract with the Government dated March 14, 1952, before signing it?

A. I believe I did.

Q. Were you aware it contained a renegotiation clause?

A. The contract of March 14th—the final contract that I received, Mr. Lydick, did not contain a renegotiation clause.

Q. Was that the contract that you put in evidence here?

A. I believe so.

Q. Isn't it a fact, Mr. Mills, you misled the court when you said you had only been a party to one civil action in this community?

Mr. Lincoff: I will object to that, if your Honor please. I think it calls for a conclusion with respect to whether he has misled the court. I think he may inquire as to whether there were other suits and name them.

(Testimony of Leonard J. Mills.)

The Court: The form of the question is not good.

Q. (By Mr. Lydick): Mr. Mills, you formerly testified, I believe, in response to a direct question from me, you had only been a party to one other civil action or a witness in one other civil action in this community. Is that correct?

A. That is correct.

Q. Were you a party to a Municipal Court action entitled National Business Counsellors vs. Modern-Aire of Hollywood, [313] Inc., No. 26741, in which you filed an Answer in propria persona?

The Court: In what court?

Mr. Lydick: Municipal Court of the Los Angeles jurisdictional district.

The Witness: Sir, that case never did come to trial.

Q. (By Mr. Lydick): You were a party to that action, weren't you?

A. If such were so, I wasn't even represented by counsel.

Q. You represented yourself, didn't you?

A. That is right. It was just a small minor item. There never even—the opponents never even appeared.

Q. I am sure you will not mind my flattering you on the excellence of that Answer; it was very nicely done.

Were you a party in a Municipal Court action against Maurice E. Menze, No. 857554?

A. I don't know that party; never heard the name before.

(Testimony of Leonard J. Mills.)

Q. A claim for auto damage for your car in an auto parking lot.

A. Modern-Aire of Hollywood?

Q. No. Leonard J. Mills.

A. I don't even recall whether that was a case—yes, I am sorry, sir. It was up here on Temple Street, that little courtroom, I appeared in. There was a small damage to my car, a small claims court.

Q. The Municipal Court of the County of Los Angeles, Case No. 857554.

A. I am not sure.

Q. \$101.55.

The Court: I don't know what the question is. Are you asking whether he was a party to the litigation or whether he appeared in propria persona or whether he appeared as a witness? Or what is the inquiry?

Mr. Lydick: I am simply intending to impeach the witness with respect to his deliberate answer to the question that he had only been a party to one action in this area before?

Mr. Lincoff: I will object to that.

The Court: If that is important, I will hope you will treat it in your brief, with quotation from the transcript. It is my recollection he disclaimed giving testimony before, but did not go to the extent of denying the participation in lawsuits. And if that question had been asked, I think it would probably have gone beyond relevancy.

Mr. Lydick: The question was asked and it was not objected to by anyone and I have asked the

(Testimony of Leonard J. Mills.)

reporter to bring her notes and read the question to the court after the recess, and also the answer.

May I continue with this line of examination, and if it doesn't tie up the court——

The Court: Certainly. [315]

Q. (By Mr. Lydick): Were you a party to a Superior Court action in Los Angeles County involving Singer Metals, Inc. Mills, Arnold Mills and Fan Mills, doing business as L. J. Mills & Company vs. Industrial Management Corporation?

A. That is correct. I was a party to the suit, but I wasn't one of those suing, if I can phrase it in that way.

Q. I am not sure I understand what that means. You were a named plaintiff?

A. If I may explain.

Q. Go ahead.

A. There was a partnership in a certain transaction between Singer Metals, Warner Benner and Harold Benner and L. J. Mills & Co. with Industrial Management.

There was a suit brought on by Singer Metals, an estate of Seattle, against Industrial Management.

The attorney asked us, the estate of Harold Benner and Warner Benner and L. J. Mills to join with them in that suit for an accounting. We agreed to joining in that suit because we were a partner in the thing. They paid all the expenses and were the main litigants in it. I did not consider myself a party in it in that sense.

(Testimony of Leonard J. Mills.)

The Court: Did you appear and testify?

The Witness: I don't believe there was any testimony on my part.

Q. (By Mr. Lydick): Did you accept the benefits of a [316] judgment for L. J. Mills & Co. in the amount of \$7,000.00?

Mr. Lincoff: That is objected to, if your Honor please, as calling for a conclusion of the witness. I think that is clearly a matter of law, whether or not one accepts a benefit.

Mr. Lydick: I will rephrase the question.

Mr. Lincoff: It goes to a number of things. I object to the question on the ground it is incompetent, irrelevant and immaterial.

Q. (By Mr. Lydick): Did you receive any money as the result of the judgment in that action?

A. I did.

Q. Did you company receive some or you personally, or both?

A. The company received some.

Q. Didn't you receive a personal judgment for \$2,338.45, in addition to the company judgment of \$7,015.37?

A. If I did, that was just my share of the company. I was and my brother and my mother are all partners in L. J. Mills & Co. If I received a personal check it was just my share of the L. J. Mills & Co. check.

Q. I won't argue the question. Were you a party to an action of Evelyn Rogers vs. Leonard J. Mills, Superior Court No. 608051?

(Testimony of Leonard J. Mills.)

A. That case hasn't come up, and it has never been in court. [317]

Q. But you are a party to the action, named defendant? A. That is right.

Q. Were you a party to a Superior Court action of Sam Kline vs. Mills and Modern-Aire—

A. That is part of the same action.

Q. It is 610523. The other one is 608051; separate actions.

A. They may be separate. They are all part of the same thing. It hasn't come up.

Q. Do you wish to explain the nature of that action, as you did the others?

The Witness: If the court wishes—

The Court: I don't. He has answered the question. There isn't any question. I don't see the materiality of it.

For instance, on a case we had this morning, which was settled, an action against the Atchison, Topeka & Santa Fe Railway, was: Can people who sue them because of a railroad accident come in here and show that the Santa Fe has been a party to other litigation in other cases? I don't think it has any relevancy.

The original impression I had—you set me right if I am not appreciating what is going on in this phase of the case—was that this man claimed, when he came to the witness stand, a lack of familiarity with the duties of a witness and with the procedure in court. I took it that this questioning

(Testimony of Leonard J. Mills.)

[318] was designed to show that he is, in fact, familiar with the giving of testimony.

He was rather asked to be excused from the somewhat loquacious type of answer which includes a lot of conclusions and not appreciating he shouldn't bring in hearsay and so on. As part of the background of that he said, "Well, this role of being a witness in a lawsuit is new to me," and I take it you are undertaking to impeach that.

Mr. Lydick: No, your Honor. I asked a specific question, which the reporter will bring to this court, in which I said, "So long as we are on the subject—" It was after you had given a somewhat detailed estimation of the witness, of the function here in court, and I said, "So long as we are on this subject, will you tell me whether you have ever been a party to a civil action or a witness in a civil action prior to this time?"

And he said, "Yes, once."

I am trying to show that that testimony, I am trying to impeach that testimony by showing he has been a party to a civil action. Whether he has been a witness or not I don't know.

The Court: Isn't that rather collateral to the issue in litigation?

Mr. Lydick: I think one of the fundamental issues that will rest for the court's decision is the veracity and lack of veracity of both plaintiff's and defendants' witnesses. [319]

The Court: There has been no objection. What I have said has simply been to alert you to a tentative

(Testimony of Leonard J. Mills.)

feeling of the judge. If it is incorrect, it will be for you to treat in your argument.

Mr. Lydick: I will, your Honor.

Q. (By Mr. Lydick): Mr. Mills, were you a party on January 19, 1950, to an action in the United States District Court of United States vs. Leonard J. Mills, Arnold Mills and Mrs. Fan Mills, co-partners, doing business in the partnership known as L. J. Mills & Co.?

Mr. Lincoff: I object, if your Honor please, on the ground it is incompetent, irrelevant and immaterial. I haven't objected previously. We don't have a jury here and I am satisfied the court is able to sift the relevant from the irrelevant.

I don't know how much longer Mr. Lydick proposes to go on with this line of inquiry. And aside from being irrelevant, I think it is incompetent. How can it prove or disprove any issues in this case?

I submit that cross examination, even for impeachment purposes cannot go so far——

Mr. Lydick: I have finished.

The Court: You mean that is as far as you intended to go?

Mr. Lydick: No, I have another.

The Court: I am still of the view to show he is a [320] loquacious character, to show he had been a witness many times doesn't tend to impeach the testimony he didn't know what to do as a witness.

Mr. Lydick: I hope to convince the court my question was a correct question, which he undoubt-

(Testimony of Leonard J. Mills.)

edly heard and he answered correctly, and involved not only his appearance as a witness but that he was a party. I will be able to show that after recess.

The Court: I don't think it means anything. You will have to argue it. We will overrule the objection.

Q. (By Mr. Lydick): Were you aware of the penalty clause in your government contract at the time you signed it?

Mr. Lincoff: I object, if your Honor please. I appreciate technically it asks for a matter of something in his personal knowledge. The contract itself contains all the terms and if it contains such a clause, it contains it. If it doesn't, it doesn't. That can be best determined by the best evidence rule and not by secondary evidence in the nature of a witness' recollection.

The Court: I take it this inquiry goes to show the knowledge in this man's mind, which he had or didn't have. It might have a bearing upon a duty to mitigate damage; is that it?

Mr. Lydick: That is right.

The Court: Overruled. [321]

Q. (By Mr. Lydick): Were you aware of the penalty clause in your government contract at the time you signed it?

A. I am not sure of the clause you are referring to.

Q. You had read the contract at the time you signed it? A. I did.

Q. Was this contract, which you have offered in

(Testimony of Leonard J. Mills.)

evidence here, the entire contract you had with the United States Government?

A. That is correct.

Q. Tell me, if you know, the customary procedure in the textile industry for obtaining a quotation on large quantities of rayon cloth.

Mr. Lincoff: If your Honor please, again I will object upon these grounds severally:

A, it is incompetent, irrelevant and immaterial, and not admissible under the pleadings. The defendant's answer raises no affirmative allegations with respect to custom and usage or practice in any trade or industry. We are here suing upon the theory of a contract.

Now, if the attempt is to show that a contract is ambiguous in any respect and, consequently, we have to resort to defining terms, I think that has to be asserted affirmatively in the defendant's pleadings.

What difference does it make, your Honor, what the custom may have been with respect to getting a whole quantity, something [322] less than a big quantity, or a small quantity? The only issue here, as I understand it, will be with respect to an interpretation that the court may want on the term "in the greige," and how is that related in determining how you order a quantity, how is it to define what a quantity is? Is it a million or ninety-four, ninety-five thousand? Where do you draw the line with respect to a quantity, small or large quantity?

(Testimony of Leonard J. Mills.)

I object on those grounds; it is entirely incompetent, irrelevant and immaterial.

The Court: The court will sustain its own objection and leave yours, your lodged objection, for comment by counsel, in view of the fact you are going to file briefs. I will rule out the testimony on the ground it is not proper cross examination.

Mr. Lydick: Counsel, will Mr. Mills be in court for the balance of the trial?

Mr. Lincoff: Mr. Mills will be here at all times.

Mr. Lydick: He will be available for me to call him during my case in chief?

Mr. Lincoff: Any time you wish him he will be here throughout the proceedings.

Mr. Lydick: No further questions, Mr. Mills.

Mr. Lincoff: May I ask now for a few moments' recess? I would like an opportunity to examine the government contract again. [323]

The Court: Let the clerk know when you are ready to re-assemble.

(Short recess taken.)

Mr. Lydick: Your Honor please, just before we proceed, the reporter was able to locate the question I asked, to which I had reference, and both Mr. Lincoff and I have had an opportunity to hear it read.

Would you mind reading it to the court at this time, Madam Reporter, and then we can go on with the cross examination.

(Whereupon, the following portion of the record was read:

(Testimony of Leonard J. Mills.)

“Q. (By Mr. Lydick): As long as we are on the subject, Mr. Mills, have you ever at any time before been a party to any civil or criminal action, or have you ever appeared as a witness in any action whatsoever? “A. Yes.

“Q. How many times?

“A. Once, I believe.

“Q. Where was that?

“A. Here in Los Angeles.

“Q. You appeared as a witness in that action?

“A. I did.”)

Mr. Lydick: No further questions. [324]

Redirect Examination

Q. (By Mr. Lincoff): Before we leave that subject, Mr. Mills, one time you testified, I think, was in Superior Court action, is that correct?

A. That is correct.

Q. And you testified a second time in a Superior Court action? A. That is correct.

Q. When did you recall or how did you refresh your recollection as to having testified on a second occasion?

A. I just called the attorney and asked him whether I was a witness in that case there, whether I was on the stand there and he advised me yes, I had gone up on the stand.

Q. You testified once in small claims action?

A. That is correct. I didn't realize I was a witness in that court. I mean it wasn't—I am sorry, your Honor, but if I may explain, it was in the

(Testimony of Leonard J. Mills.)

small claims court and the party that hit me and I both appeared before the judge, the bench there. I didn't think it was in the form of a court, the way we both explained our stories and the matter was settled right there.

Mr. Lincoff: Of course, the court knows attorneys are not permitted to practice in small claims court, so I am satisfied Judge Tolin knows what transpired in small claims [325] court.

If I may inquire through the court, I have examined Exhibit 12 and I have found nothing in the nature of a penalty clause. If counsel will point out to me, I will be happy to look at it.

There is nothing designated as such, and consequently I have found nothing on which to make inquiry.

Mr. Lydick: The government contract, Exhibit 12, Section 11, "Default."

If the court please, is counsel suggesting that perhaps his client didn't know what I was talking about?

Mr. Lincoff: I think the word "penalty" was used.

The Court: I don't know what is going on.

Mr. Lydick: I don't, either.

Mr. Lincoff: I don't, either.

The Court: If someone asks a question or makes a motion, then the court has something to rule on. But the comparative degree of familiarity of counsel with the exhibit is something that is of slight interest to me.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): Mr. Mills, you testified, in response to a question on cross examination, that Mr. Piersol told you that there would have to be some scouring done to the cloth, is that correct?

A. That is correct.

Q. Will you state when it was that Mr. Piersol told you [326] that? Give me just the time or the date, if you can.

A. Approximately a week or more after the 21st of March Mr. Piersol himself learned what was required then from the Military and explained it to me, that the goods had to be scoured in order to meet the porosity.

Q. Now, where was it that this conversation took place, in which Mr. Piersol gave you this explanation?

A. I am not sure whether it was on the phone or in his office.

Q. Will you relate what was said on the occasion of that conversation, relating what you said and what Mr. Piersol said relative to the subject of scouring the goods?

A. To the best of my recollection Mr. Piersol said that he had learned that the goods had to be scoured in order to get it to meet the porosity test.

Q. And what did you say?

A. I just accepted the information. I don't recall what my answer was.

Q. Is that the first time that Mr. Piersol had ever told you that anything would have to be done to the goods by way of scouring?

(Testimony of Leonard J. Mills.)

A. That is the first time; other than that, the TWX mentioned it.

Q. I am talking about what Mr. Piersol told you. A. That was the first time. [327]

Q. Did Mr. Piersol at any time, between the time of your first contact with him and the occasion which you have just mentioned, tell you that any finishing or any processing or any scouring had to be done to that goods?

A. No, sir, he did not.

Q. The first knowledge you had that any additional work had to be done was on the occasion of March 21st teletype and an occasion subsequently, when the word "scouring" was mentioned, is that correct? A. That is correct.

Mr. Lincoff: Now, Mr. Clerk, may I have Exhibits 15 and 16 for identification, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I place before you, Mr. Mills, Plaintiff's Exhibits 15 and 16 now marked for identification, and ask you to examine those documents.

Did you receive those documents, Exhibits 15 and 16 for identification, in response to an inquiry which you made for procuring this cloth elsewhere?

A. Yes, I did.

Q. By referring to the dates, can you state when it was that you received Plaintiff's Exhibit 15?

A. Plaintiff's Exhibit 15 I received on approximately the 4th of April.

(Testimony of Leonard J. Mills.)

Q. When is it that you received, to the best of your [328] recollection, Plaintiff's Exhibit 16?

A. Oh, approximately the 31st of March.

Mr. Lincoff: We will offer in evidence at this time, if your Honor please, Plaintiff's Exhibits 15 and 16.

Mr. Lydick: If your Honor please, I object to the introduction into evidence of the letters. Persons who wrote those letters and explained the background and circumstances surrounding the writing of them are right here in Los Angeles and can be called to testify.

I see no reason at all why we should have to accept the communications, unless he knows the nature of the inquiry and other circumstances and facts that may have occurred that led to the writing of these letters on these dates.

The Court: May I have the last few questions and answers?

(The record was read.)

The Court: By themselves, of course, they are insufficient to have any control in the deliberation here. But you can only do one thing at a time.

I assume they will be connected up. Hence, they will be provisionally admitted, the provision being, of course, there will be proper testimony to bring them into their correct setting.

(The documents heretofore marked Plaintiff's Exhibit Nos. 15 and 16 were received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, did you

(Testimony of Leonard J. Mills.)

at any time [329] ascertain what it would have cost you to procure this cloth, as per Specification PA-PD-29, from another source?

A. I found that it would be approximately \$10,000.00 more to obtain this cloth from Paul Whitin Manufacturing Company, which was the cheapest source obtainable, to my knowledge.

Mr. Lydick: If your Honor please, it appears to me that is pure hearsay. I would like to know precisely what it was based upon.

The Court: Develop what it was based upon, counsel. That was a comment, it wasn't a motion.

Mr. Lydick: Particularly with respect to whether or not anyone representing my client was present while these conversations were going on.

The Court: If you make a motion to strike it, then I have something on which to rule.

Mr. Lydick: I move to strike, your Honor.

The Court: Motion granted.

Mr. Lincoff: Now, Plaintiff's Exhibits 6 and 7, may I have those, please, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Lincoff): Those, you recall, Mr. Mills, are the two letters you testified you procured on about the same date in Mr. Piersol's office, that is, March 6, 1952? You remember that? [330]

A. Yes.

Q. I believe Mr. Lydick questioned you at length about the contents of Plaintiff's Exhibit 7 and particularly the second paragraph of that letter.

(Testimony of Leonard J. Mills.)

Would you read it to refresh your recollection, as to its contents, before my next question?

A. You want me to read it to the court, sir?

Q. No, just to yourself.

Mr. Lydick: Excuse me, counsel. Is that Exhibit 7?

Mr. Lincoff: 7.

The Witness: I have read it.

Q. (By Mr. Lincoff): You notice that says, among other things, "subject to your receipt of the contract from the Government"?

A. That is correct.

Q. Did you do anything subsequent to March 6th with respect to notifying Mr. Piersol that you had received the contract?

A. Yes, sir, I did.

Q. What did you do?

A. On March 10th, I believe approximately March 10th I had advised him I had received the advance copy of the government contract.

Q. What had you told him on March 6th, on the occasion of your meeting him in his office, with reference to a contract [331] from the Government?

A. That I had a contract with the Government subject only to his giving me confirmation of the fact that I have contracted for the goods with Deering-Milliken.

Q. Now, you did subsequently receive the contract from the Government, which is in evidence as Plaintiff's Exhibit 12? I will show it to you, to

(Testimony of Leonard J. Mills.)

be sure you and I are talking about the same document.

A. Would you repeat the question?

Mr. Lincoff: Please read the question.

(The question was read.)

The Witness: I did.

Q. (By Mr. Lincoff): Is that the contract that you received or a copy of it? Did you call Mr. Piersol to tell him you had received the Government contract?

A. Yes, I did call him.

Q. Now, Mr. Mills, Plaintiff's Exhibits 9 and 10 I will place before you.

Plaintiff's Exhibit 9 is the check which you issued to Deering-Milliken?

A. That is correct.

Q. Had you had a conversation with Mr. John Smith in New York prior to the issuance of that check?

A. I spoke to the credit manager of Deering-Milliken. I am not sure his name now was Mr. Smith, but he was the [332] credit manager that Mr. Piersol asked me to call in New York.

Q. Now, when you talked with him, will you relate again what your conversation with him was with respect to payment of moneys on the contract?

A. First I explain to him the meaning of the 90 per cent partial payment clause in the government contract, on the basis of the explanation of the type of contract that I had with the Government.

We arranged that I would pay a sum equal to 10 per cent of the total contract, Deering-Milliken

(Testimony of Leonard J. Mills.)

contract, in payment for the last 10 per cent of the goods to be delivered to me.

Q. And subsequently, subsequent to the conversation with the gentleman in New York, you prepared the check on or about the date it bears, is that correct? A. That is correct.

Q. I am referring again to Plaintiff's Exhibit 9.

A. I am sorry. Would you repeat your question?

Mr. Lincoff: Will you read the question?

(The question was read.)

The Witness: Subsequent to the conversation I did prepare the check, when Mr. Piersol——

Q. (By Mr. Lincoff): That is going to be my next question. Don't anticipate. A. O.K.

Q. Who made the specific request of you that you prepare [333] this check?

A. Mr. Piersol called me and advised me that New York had requested him to obtain the check from me.

Q. Then you prepared it on or about the date it bears? A. That is correct.

Q. You said, I believe, you took it up to Mr. Piersol's office personally?

A. That is correct.

Q. Did he hand you at that time Plaintiff's Exhibit 10? A. That is correct.

Q. It was delivered to you manually and not through the mail, is that correct?

A. That is correct.

Mr. Lincoff: No further questions on redirect.

Mr. Lydick: I have just one question.

(Testimony of Leonard J. Mills.)

Recross Examination

Q. (By Mr. Lydick): The circumstances regarding this telephone conversation you had with someone in our New York credit department, Mr. Mills, is very important to the case.

Would you make every effort possible to recollect the name of the person you talked with?

A. I am unable to recall the name now, since it doubtless was put in my mind as to whether it was Mr. Smith.

Q. Where did you get the name Smith, again?

A. Mr. Lincoff mentioned the name as Mr. Smith. I don't know whether he obtained it from Mr. Piersol—I can't answer that.

Q. You just can't remember the name of the man?

A. I can't recall the name of the man.

Q. Was it a Mr. John McEwen, perhaps?

A. It may have been. I just can't recall. It was that long ago; I just spoke to the gentleman that one time.

Q. Was it a Mr. Ferris, perhaps?

A. It is difficult for me to remember. John McEwen, that name sounds familiar, but I am not able to say that is it or not.

Q. Does Mr. Monahan sound familiar?

A. Yes.

Q. McEwen sounds more familiar than Ferris?

A. I would only be straining my memory, to attempt to guess at one or the other. It was the

(Testimony of Leonard J. Mills.)

gentleman Mr. Piersol told me to call, that I spoke to.

Q. Are these words you recall so precisely your exact recollection or the gist of the conversation?

The Court: I don't think that the recollection was precise. It seemed to me he testified, rather, to a legal effect, as he thought it existed.

If you want to get him to state it precisely, you might do so. Otherwise, I am not going to consider that he recalled [335] the conversation at all.

Mr. Lydick: No further questions, your Honor.

Mr. Lincoff: That is all.

The Court: Thank you, Mr. Mills.

The Witness: Thank you.

(Witness excused.)

Mr. Lincoff: At this time I would like to call Mr. Lee Piersol under Rule 43 (b) of the Rules of Federal Procedure.

LEE PIERSOL

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. State your full name, sir.

The Witness: Lee Piersol.

Direct Examination

Q. (By Mr. Lincoff): Where do you live, Mr. Piersol? A. 732 Irolo Street, Los Angeles.

(Testimony of Lee Piersol.)

Q. You are the regional manager of Deering-Milliken Co., is that correct? A. Yes, sir.

Q. As such you are the man in charge of the local office and of final decisions with respect to the conduct of business in your local office, is that not true?

A. Well, I wouldn't like to say that was true, because I don't have final decisions on lots of things that go [336] through my office.

Q. Unless it goes——

A. I say I do not have final decision on lots of things that go through my office.

Q. But you are the man who has the final decision with respect to business in your local office, do you not?

A. Well, sir, I don't exactly understand that question.

Q. Well, Mr. Piersol, I want to call your attention to the taking of your deposition on March 31, 1953, and April 2, 1953. You recall that, do you not?

A. Yes, I do.

Mr. Lincoff: May I inquire of counsel, through the court, whether there are any corrections appearing upon the deposition of Mr. Piersol at page 19.

The Court: How are you using this, to refresh recollection or to impeach?

Mr. Lincoff: To impeach, your Honor.

The Court: Then you have a right, Mr. Witness, to see it if you wish.

The Witness: I would like to see it, sir.

The Court: When you put your question show——

(Testimony of Lee Piersol.)

Mr. Lincoff: Yes, I propose to put the original before him.

The Court: Yes.

Mr. Lincoff: Do you have the original deposition, Mr. [337] Lydick?

Mr. Lydick: Yes.

Q. (By Mr. Lincoff): Mr. Piersol, will you be kind enough to turn to page 19 of your deposition?

A. Yes, sir.

Q. I direct your attention particularly to lines 11 through 13. I will read as follows, and ask you whether or not this question was not put to you on March 31, 1953, and if you did not give the answer which appears there:

“Q. And final decisions, such as they may be with respect to business in the local office, are made by you? “A. Yes, sir.”

A. Yes, I did say that.

Q. I will also ask you if you will please, Mr. Piersol, turn to page 65 of your deposition.

A. (Witness complies.)

Q. And direct your attention particularly commencing at line 21 and going over to line 4 on page 66. I will read the question and the answer, and ask you whether or not on the occasion of April 2, 1953, which was the continued taking of the deposition, whether you did not, in response to the questions put, give the answers there appearing——

Mr. Lydick: Counsel, there is a correction appearing on this page, which I advised you of prior

(Testimony of Lee Piersol.)

to trial. That is [338] in line 22. Mr. Piersol wishes to change the phrase "general manager" to "regional manager."

Mr. Lincoff: I wasn't aware of it. I don't recall that you did or didn't, Mr. Lydick.

Q. (By Mr. Lincoff): Very well. Commencing at line 21, this question in part was put to you:

"I believe you testified, did you not, that you have been general manager since 1943?"

That you have changed that by changing the word "general" to "regional." "A. Yes.

"Q. You are the gentleman with the so-called final say on all matters having to do with the conduct of the local office, is that correct?

"A. That is correct.

"Q. And that has been the case since 1943 up to date? "A. Yes."

Did you give those answers in response to those questions? A. Yes, I did.

Q. Now, Mr. Piersol, do you know the president of the plaintiff corporation, Mr. Leonard Mills?

A. Yes, sir.

Q. You may put the deposition down, Mr. Piersol. A. All right. [339]

Q. When did you first meet Mr. Mills?

A. About the 21st of December 1951.

Q. Was that a meeting face to face or was that as a result of a telephone conversation?

A. My recollection is it was as a result of a telephone call.

(Testimony of Lee Piersol.)

Q. Did you have a conversation with Mr. Mills on that occasion over the telephone?

A. I believe I did.

Q. Will you relate, as best you can recall, what you said and what Mr. Mills said on the occasion of your first telephone conversation?

A. Mr. Mills introduced himself as a manufacturer of objects made of textiles, and he said that he was interested in obtaining from the company I represented a quotation on from four to five hundred thousand yards of natural or unbleached rayon of certain widths and a certain weight. That is what Mr. Mills asked me. Did you ask what I said to Mr. Mills?

Q. Yes. Now will you say what you told Mr. Mills?

A. I told Mr. Mills I would be glad to report his inquiry to our home office in New York, and reply to him as soon as I had a reply for him.

Q. Was that the end of the conversation?

A. I don't remember anything beyond that.

Q. Very well. Now, did you make an inquiry of your home office with respect to Mr. Mills' original inquiry to you?

A. Yes, I did.

Q. In what form did you make it, teletype or by letter?

A. I made it by letter.

Q. Do you have a copy of the letter here in court with you, Mr. Piersol?

A. I don't know whether the letter is here now or not.

Q. Was there not served upon you, Mr. Piersol,

(Testimony of Lee Piersol.)

as an officer of Deering-Milliken Co. a subpoena duces tecum?

Mr. Lydick: I have the letter, counsel, in response to service of the subpoena.

Mr. Lincoff: May I ask, through the court, if he will kindly produce the letter or copy thereof?

Mr. Lydick: I have no objection to producing the letter. I point out to counsel that the service was improper. We do have the file, though.

The Court: If what you are saying is something the court is supposed to hear or which is going in the record, we are not hearing you. I am sure the reporter is not, either.

Mr. Lydick: I was stating to counsel, and pointing out the fact service was improper. We are perfectly pleased to produce the document you requested.

Mr. Lincoff: This is the first I heard of any attack [341] on sufficiency of service.

Mr. Lydick: I won't make any issue of it, but the service was improper.

The Court: We have enough to do to decide the disputed issues.

Mr. Lincoff: Will you please mark this for identification?

The Clerk: Plaintiff's?

Mr. Lincoff: Yes.

The Clerk: Plaintiff's Exhibit 18 for identification.

(The document referred to was marked

Plaintiff's Exhibit No. 18 for identification.)

Q. (By Mr. Lincoff): I place before you, Mr. Piersol, what has been marked for identification as

(Testimony of Lee Piersol.)

Plaintiff's Exhibit 18. Would you kindly read the document before I put my next question to you?

A. Yes. I have read it.

Q. Was that the communication which you directed to New York? A. Yes, sir.

Q. And was it directed to New York on or about the date it bears? A. Yes, sir.

Q. What date does it bear, sir?

A. December 21, 1951.

Mr. Lincoff: We will offer this in evidence, if your [342] Honor please, as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 18 was received in evidence.)

Q. (By Mr. Lincoff): Will you kindly place it before his Honor, Judge Tolin, please?

A. Yes.

The Court: Place it before the clerk. The clerk marks them into evidence and the clerk hands them up to the court.

Mr. Lincoff: I beg your pardon.

The Court: We have to keep our record clear.

Q. (By Mr. Lincoff): Did you subsequent to the date of your inquiry to New York receive a response to it? A. Yes, sir, I did.

Q. And in what form did you receive the response?

A. I am not sure now whether it was teletype or letter. I think it was teletype.

(Testimony of Lee Piersol.)

Q. Do you have the communication received from New York whether it be teletype or letter?

A. I think it is probably present.

Mr. Lincoff: May I ask it be produced?

Q. (By Mr. Lincoff): Do you remember approximately how soon after your initial inquiry to New York it was you received the response from the New York office?

A. I believe it was about January 10th. [343]

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's 19 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 19 for identification.)

Mr. Lincoff: Your Honor, excuse me while I confer with co-counsel.

The Witness: I think, if I may make another statement, I think it could have been later than January 10th, possibly January 19th.

Q. (By Mr. Lincoff): Well, I will do what I can to assist in your refreshing your recollection, by placing before you a document which has been marked for identification as Plaintiff's Exhibit 19.

A. That is right, January 9th.

Q. Does that refresh your recollection, Mr. Piersol, as to when you first received a response to your initial inquiry to New York?

A. According to my recollection, that is the response to it (indicating).

Q. You received that on or about the date it bears, is that correct, sir?

A. I believe I received it on January 9th.

(Testimony of Lee Piersol.)

Q. I notice there, Mr. Piersol, that there are two other messages. None of those, however, have any reference to Modern-Aire, to the best of your knowledge or observation, [344] do they?

A. No, sir, they do not.

Q. It is only the one appearing last in order on that sheet? A. Yes, sir.

Q. Who is Mr. Lovett, Mr. Piersol?

A. Mr. Lovett is a salesman in our New York office.

Q. To your knowledge that is the Mr. Lovett whose name appears on this document, is that correct? A. Yes, sir.

Mr. Lincoff: We will offer this in evidence, if your Honor please, as Plaintiff's exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 19 was received in evidence.)

Q. (By Mr. Lincoff): Now, subsequent to the receipt of Plaintiff's Exhibit 19, sir, which is the teletype response from Mr. Lovett, did you call Mr. Mills at all?

A. Yes, sir, I am sure I did.

Q. And to the best of your recollection when was it that you called him?

A. To the best of my recollection I called him on the 9th of January, the day I received the teletype.

Q. Did he come to your office in response to your call?

(Testimony of Lee Piersol.)

A. I don't have a clear recollection of that.

Q. But you had a conversation with him on that date?

A. Yes.

Q. Will you relate the conversation, sir, stating what you said and what Mr. Mills said?

A. I told Mr. Mills the contents of the teletype, with reference to Government Specification PA-PD-29, as to which he inquired, and I told him that we could only quote on the narrower than the widths inquired about, for our mill could not make goods as wide as 55 inches, which was the wider of the two, and that we were quoting in the greige.

Q. If I may interject, I am having a little difficulty hearing you, as a result of your keeping your hands in front of your face.

The Court: I see counsel indicating difficulty. Bear in mind this is a very large room, and we have to speak up.

The Witness: I will try to do better.

Mr. Duque: May we have the answer read up to this point? I couldn't hear any of it.

The Court: Read the question and the answer.

(The record was read.)

Q. (By Mr. Lincoff): Incidentally, you had used the term "in the greige" prior to the occasion which you have now mentioned, had you not, Mr. Piersol?

A. Since I have been here on the stand?

Q. No, sir. Prior to having—— [346]

A. I believe I mentioned it prior to it because

(Testimony of Lee Piersol.)

I—it was my understanding I was talking about greige goods.

Q. What is your interpretation of the meaning of the phrase “in the greige”?

A. “Greige” means goods that, as they come off of the looms.

Q. That is, of course, without reference to color or bleaching or unbleaching, is that correct?

A. That is correct, yes.

Q. That is what you meant when you sent your first communication to New York, is that correct?

A. That is what I meant, yes.

Q. At the first time that you made your communication to New York, you specified, did you not, according to Specification PA-PD-29 in the greige?

A. I don't believe I used the word “greige” at that time. I used the words that Mr. Mills gave to me, which were “natural or unbleached,” which meant greige to me.

Q. You subsequently, however, or, it was your understanding of the phrase “in the greige,” at least, up to the time of the taking of your deposition, that it always was simply as it came off the loom, is that correct?

A. Yes, sir.

Q. Now, was there anything further said in the conversation you had with Mr. Mills subsequent to the receipt of the [347] teletype, Plaintiff's Exhibit 19?

A. I believe in that conversation Mr. Mills said that he would like to have a 60-day option on our quotation.

(Testimony of Lee Piersol.)

Q. Mr. Mills, did he say anything else?

A. I think he said his reason for the 60-day option was it took a considerable length of time to go through the government processes.

Q. Did you ever write a letter to Mr. Mills subsequent to the conversation, following the receipt of Plaintiff's Exhibit 19, Mr. Piersol?

Perhaps I can refresh your recollection.

A. I believe I wrote a letter on that day.

Mr. Lincoff: May I have Plaintiff's Exhibit 1, please, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Lincoff): I will place before you, Mr. Piersol, what has been previously admitted in evidence as Plaintiff's Exhibit 1, and ask you to read the document before I ask you my next question.

A. (Witness complies.)

Q. Is that the letter that was written subsequent to the conversation which you have just related that took place upon receipt of Plaintiff's Exhibit 19, the TWX from Mr. Lovett?

A. That was the day I talked to Mr. Mills, or the day after I talked to him. [348]

Q. It was subsequent to that conversation that you wrote the letter, Plaintiff's Exhibit 1, is that correct?

A. I believe so, to the best of my recollection.

Q. There is no mention in the letter, which you have before you, of any option, is there, Mr. Piersol?

(Testimony of Lee Piersol.)

Mr. Lydick: Your Honor please, I have heard this objection enough during the time of the course of this trial, that the document speaks best for itself, so I object to the question on that ground.

The Court: Sustained.

Q. (By Mr. Lincoff): Now, subsequent to your writing Plaintiff's Exhibit 1, which you have before you, did you have any other conversation with Mr. Mills?

A. I am not sure I had any other conversation with Mr. Mills in that, near that date.

Q. To the best of your recollection when was it that you first had a conversation subsequent to the one preceding the letter of January 10th, Plaintiff's Exhibit 1?

A. I believe it was early in the month of February.

Q. Now, had you at any time subsequent to Plaintiff's Exhibit 1 received any shipping instructions with respect to this cloth that Mr. Mills wanted?

A. I don't remember, but I hardly think so.

Q. When is the first time that you received any information relative to shipping instructions, to the best of your [349] recollection, Mr. Piersol?

A. To the best of my recollection it was somewhere around March 4th.

Q. March 4th of 1952? A. 1952, yes.

Q. Let's go back so I may keep the chronology correct.

(Testimony of Lee Piersol.)

Mr. Lincoff: May I have Plaintiff's Exhibit 2, Mr. Clerk, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I hand you Plaintiff's Exhibit 2 in evidence, Mr. Piersol. That, of course, bears the signature of Henry Kramer.

Your counsel and I have stipulated there is no question but what that is his signature on the document and it was issued out of your office.

Did you ever see that letter at all? I am now referring to Plaintiff's Exhibit 2.

A. I think I saw it; I am not sure I did.

Q. Mr. Henry Kramer is an employee in your office?

A. Yes, he is my assistant.

Q. And he was on or about the date that letter bears?

A. Yes.

Q. Does that letter refresh your recollection as to whether you had any conversation with Mr. Mills on or about January 16th? [350]

A. I do not think I had any conversation with Mr. Mills at that time.

Q. Very well. Now, to the best of your recollection you had your first conversation with Mr. Mills when after January 10th, Plaintiff's Exhibit 1?

A. About the 8th of—the 19th of February, I believe.

Q. 19th of February?

A. Along about the 19th of February. I won't say definitely the 19th of February.

(Testimony of Lee Piersol.)

Q. I will try to assist you in refreshing your recollection.

Mr. Lincoff: May I have Plaintiff's Exhibit 3 in evidence, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I will place before you Plaintiff's Exhibit 3, Mr. Piersol, and ask you to examine that document which also bears the signature of Mr. Henry Kramer.

Does an examination of that document refresh your recollection as to whether you had a conversation with Mr. Mills on or about that date?

A. I don't believe I had a conversation with Mr. Mills about that date.

Q. Now, the other occasion when you had your conversation in February, when was it that you said that conversation took place, to the best of your recollection? [351]

A. My recollection is it must have been around the 19th of February.

Q. Where did the conversation take place?

A. I am not sure whether it was in my office or by telephone.

Q. Would you relate what the conversation was, stating what you said and what Mr. Mills said?

A. I believe it related to Mr. Mills asking me for a better quotation than we had made him.

Q. What did you say to Mr. Mills?

A. I think I said I would find out from our New York office, or would find out from the mill whether we could make a better quotation.

No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,

Appellant;

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for
the Southern District of California, Central Division.

Hon. Ernest A. Tolin, Judge.

APPELLANT'S OPENING BRIEF.

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No. 14481
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,
Appellant,
vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee.

Appeal From the District Court of the United States for
the Southern District of California, Central Division.

Hon. Ernest A. Tolin, Judge.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal by Deering-Milliken & Co., Inc., defendant, from a final judgment against it in the United States District Court for the Southern District of California, Central Division, docketed and entered on May 18, 1954. Within thirty (30) days from the entry of said judgment and on June 17, 1954, appellant duly filed its Notice of Appeal therefrom. [Tr. I, p. 35.] Jurisdiction of the within appeal therefore exists in this Court by virtue of the provisions of Title 28, *United States Code*, Sections 1291 and 2107.

Jurisdiction of the within cause existed in the trial court by virtue of Title 28, *United States Code*, Section 1332-(a)(1). Plaintiff-appellee is a California corporation and defendant-appellant is a New York corporation and the matter in controversy exceeds the sum of \$3,000, exclusive of interest and costs. These facts are alleged by plaintiff in paragraph I of its complaint [Tr. I, pp. 3-4], and are found to be true by the trial court in paragraph I of its Findings of Fact. [Tr. I, p. 25.]

Statement of the Case.

Introduction.

Appellant realizes that this opening brief is lengthy. We feel this is necessary, however, in order to properly set forth the evidence and to argue the novel rulings made by the District Court which appellant believes constitute reversible error. In addition, appellant has attempted to set forth a brief, but complete, summary of the facts involved on this appeal which concerns the specialized and technical industry of textiles.

This is an action by appellee Modern-Aire of Hollywood, Inc., a corporation wholly owned by Leonard Mills, its president, against appellant Deering-Milliken & Co., Inc., national sales agency for certain textile mills located in the Carolinas. Appellee's complaint alleges the formation, existence and breach by appellant of a contract with appellee for the purchase and sale of 126,000 yards of rayon goods, resulting in damage to appellee in the claimed amount of \$17,118.04. [Tr. I, pp. 3-16.] Appellant's answer specifically denies the existence of any contract with appellee, the alleged breach thereof by appellant, and that appellee suffered any damage due to the conduct of appellant. [Tr. I, pp. 16-17.]

The basis of appellee's claim arises out of its insistence that preliminary oral and written negotiations between appellant and appellee ripened into an enforceable written contract on March 6, 1952. This contract allegedly provided that appellant agreed to manufacture and deliver to appellee 126,000 yards of rayon cloth which appellee sought to use in the manufacture of inner assembly liners for cartridge cases for the United States government. As a result of an alleged breach of this contract, appellee sued to recover as damages (1) profits allegedly lost from the government contract and (2) a penalty for which the United States has allegedly made claim from appellee for failing to perform its government contract.

Appellant contends simply that no contract, written or otherwise, was ever entered into between appellant and appellee and in the alternative, that if a contract did exist and was breached by this appellant, appellee did not suffer such damage as under the law is recoverable from appellant.

The Parties.

In order to properly analyze and understand this action, one must at the outset consider the parties involved and, since those parties are corporations and thus may speak only through their authorized representatives, the persons who are alleged to have spoken on their behalf.

According to the testimony of its president and sole owner, Leonard Mills, at all times here pertinent plaintiff Modern-Aire of Hollywood, Inc. (hereinafter referred to as Modern-Aire or as appellee) has been a California corporation whose physical assets, leased and owned, were those of a manufacturer of *finished* textile products. Prior to its acquisition by Mr. Mills, it had been in the business of manufacturing finished textile products for several years. When acquired by Mr. Mills, it was, in his words, a shell of a company with a tax loss carry forward of which he planned to take advantage. Acquired for the primary purpose of having a medium through which Mr. Mills might seek to obtain government contracts for finished textile items, Modern-Aire in fact never produced a single item until late in 1952 (after its negotiations with appellant) when, for a very short time, its facilities were used by Mr. Mills in the manufacture of ladies sportswear. Although contracts for the manufacture of flare parachutes, surgical drapes and 105 mm. and 75 mm. cartridge case liners were all sought from agencies of the United States during the period here in question, the only government contract ever obtained by Modern-Aire was one for 105 mm. cartridge case liners presented in this action as Plaintiff's Exhibit 12. [Tr. I, pp. 73-74, 117-118, 120-122, 124.]

With one exception [Tr. II, p. 567] Mr. Mills himself when directly questioned regarding the subject denied all

but the most limited knowledge of the textile industry, its customs, usages and terminology, but apparently has in fact been connected with that industry in one way or another since childhood and for more than twenty-five years, except for one venture into the jewelry business. As a youth he "worked, worried and enjoyed" with his father in the hat manufacturing business owned by his father and the retail millinery shops operated by his mother and father. During his college years he spent part of a year traveling on the road for Stock Bros. Ribbon Corporation and, after his father's death, assisted his mother in the operation of the retail millinery shops above noted. Apparently during the course of his operation of one of his enterprises, a war surplus business, he bought and sold on various occasions cotton and burlap goods and negotiated for the manufacture of or manufactured handkerchiefs, burlap bags and furniture materials. [Tr. I, pp. 71-73, 114-119.]

Defendant Deering-Milliken & Co., Inc. (hereinafter referred to as Deering-Milliken or as appellant) is one of the largest textile sales agencies in the United States, as well known in the textile industry as are General Motors or Chrysler in the automobile industry. With main offices in New York and sales offices in New York and other major cities throughout the United States, it acts and has acted for more than 80 years as selling agent for various cotton, woolen and rayon mills in the Carolinas. However, appellant is only a sales agency. It neither manufactures cloth nor owns the mills which do manufacture cloth. Appellant's sole purpose is to find customers for the various textile mills that it represents. In this sense appellant may be likened to a stock broker whose function is to transmit the present market price of particular cloth, referred to as a "quotation," among the trade, and thus bring the buyer and seller together. Appellant's method of operation is fixed and widely known in the industry. [Tr. II, pp. 618, 623-624, 690-691.]

Appellant's local sales offices, such as that maintained in Los Angeles and managed by Mr. Lee Piersol, solicit, re-

ceive and transmit both "inquiries" (requests for quotations) and "orders" for textile goods to the New York head office where they are in turn referred to the proper mill for quotation and, in the case of orders, for acceptance or rejection. Local sales offices have no contact with the mills themselves. The replies of the textile mill in response to "inquiries" are referred through the New York main office to local sales offices for transmittal to the person making the inquiry. In the case of an order, a formal written contract or "Salesnote" is prepared in appellant's New York office and sent directly to the person placing the order for his signature. This, however, is done only after the order actually has been accepted *by the mill* and processed through appellant's credit department. [Tr. II, pp. 440-446, 618-620.] These practices of Deering-Milliken are consistent with those of all other major sales agencies in the textile industry and, in fact, are the sales practices of that industry. [Tr. II, pp. 623-624.]

Mr. Lee Piersol, manager of the Los Angeles office, although in full charge of salesmen, office personnel and local office management, has and asserts no authority to make quotations, accept orders or enter into contracts on behalf of either Deering-Milliken or the mills represented by Deering-Milliken. Questions regarding availability of particular fabrics, price, delivery, shipping, credit terms and all other details are invariably referred to the New York office for reply. [Tr. I, pp. 339-341; Tr. II, pp. 370-373, 470, 547-549.] To anyone even remotely familiar with the textile industry, these procedures are obviously essential, for a given mill has only so many looms and the availability and scheduling of those looms for the manufacture of a particular order is, along with price and credit establishment, a key factor in the determination of whether or not that particular order can be accepted or rejected by the mill involved.

Modern-Aire does not deny these trade usages but claims a lack of personal knowledge of them. In this connection

it should be noted that these procedures, as well as the limited authority of appellant's local offices, were explained to Mr. Mills and he, in fact, admits knowledge of them in some detail. [Tr. I, pp. 98, 156-160, 205-208; Tr. II, pp. 448-449, 470.]

Since some mills represented by Deering-Milliken specialize in the production of cotton goods, others in the production of woolen goods and others in the production of the various synthetic fabrics such as rayon, the New York main office of Deering-Milliken is departmentalized accordingly. In charge of the rayon goods department in New York is J. C. Harris. Under his supervision and specializing in the handling of inquiries from local sales offices regarding rayon goods to be manufactured in accordance with government specifications is Charles Lovett. [Tr. II, pp. 447-448, 620.] These men, along with John McEwen, then of the credit department, dealt with Mr. Mills within the limitations of their authority on behalf of Deering-Milliken.

Statement of Facts.

In the latter part of 1951 Mr. Mills was attempting to obtain a contract from the Ordnance Department of the United States Army for the manufacture of a large quantity of inner assembly liners for cartridge cases. The army requirements with respect to the cloth from which these cartridge case liners were to be manufactured by Mr. Mills were set forth in a detailed five page purchase description entitled PA-PD-29, wherein general specifications, requirements, sampling, inspection and test procedures are found.* [Pltf. Ex. 5.] Three of the requirements which become of importance here are that the cloth be of rayon, that the *finished* cloth be uniformly and closely woven and free of weighting materials, and that the cloth have an air permeability of 50 plus or minus 15 cubic feet per minute per square foot.

*This is the same as specification PXS-1300. [Tr. I, pp. 82, 230; Tr. II, p. 627.]

As a part of his effort to obtain a government contract, Mr. Mills made inquiry in mid-December, 1951, of appellant for a price quotation on rayon cloth. This was the first contact between appellant and appellee. [Tr. I, pp. 74-77, 123-126.] At this time Mr. Mills was negotiating with the government for both 75 mm. and 105 mm. cartridge case liners and his inquiry for a price quotation consequently was general and related to several different widths of rayon cloth. Mr. Piersol referred this initial inquiry to appellant's New York office, as he had informed Mr. Mills he would do. [Tr. I, p. 156; Pltf. Ex. 18.] As a matter of routine Mr. Harris in New York referred the inquiry to Mr. Lovett. Mr. Lovett in turn checked with his company's fabric development department where he learned (1) that one of the mills represented by Deering-Milliken could manufacture *greige* goods which would meet the specification when finished, and (2) that the specification called for *finished* goods, free of weighting materials. [Tr. II, pp. 624-626.] After checking with the mill involved, the market price of the cloth was transmitted by Mr. Lovett to Mr. Piersol [Pltf. Ex. 19] who in turn transmitted the price quotation to Mr. Mills by telephone and, at Mr. Mills request, confirmed it by a letter dated January 10, 1952. [Tr. I, pp. 180-181; Pltf. Ex. 1.] The quotation was for *greige* goods, *as was every quotation ever transmitted to Mr. Mills by Deering-Milliken*. [Tr. I, pp. 341-349; Tr. II, pp. 446-448, 450-453; Def't. Exs. A and B.] To this point, it was clear to Mr. Mills that he did not have a contract with appellant. [Tr. I, pp. 178-181.]

Although he had no independent recollection of his first meeting with Mr. Piersol [Tr. I, pp. 162-164], Mr. Mills maintains that he inquired for goods which *when delivered* to him would meet specification PA-PD-29. [Tr. I, p. 76.] Moreover, he testified that he read these lengthy specifications to Mr. Piersol in great detail at the time of their initial contact. [Tr. I, pp. 79, 150-155.] The written record

of these first conversations, however, indicate that Mr. Mills asked for quotations on specification PA-PD-29 in *natural* or *unbleached* cloth. [Tr. II, p. 448; Pltf. Ex. 18.] Hindsight reveals that it was from this very beginning that a misunderstanding existed between the parties concerning the subject matter of their negotiations and the terms used by them.

Deering-Milliken deals only in rayon “greige” (pronounced “gray”) goods, and that is well known to those who deal in textiles. [Tr. II, pp. 623-624, 690-691.] The term “greige” has a well defined and established meaning in the textile industry. It has *absolutely no connotation as to color*, but rather refers to all the physical characteristics of cloth as it comes off the loom, *i. e.*, cloth in its natural state. Greige goods are sometimes referred to as “natural” or “unbleached” goods. In contradistinction, “finished goods” are defined as goods which have been dyed, bleached, printed, or otherwise processed after they have been loomed. The process of finishing greige goods is called “converting.” All of these terms are in every day use and elementary to the textile industry, and Mr. Pier-sol, Mr. Lovett and the other employees of appellant so understood and used then. [Tr. I, pp. 347-348; Tr. II, pp. 549-550, 620-622, 688-690.]

Dealing only in rayon greige goods, appellant interpreted Mr. Mills inquiry for a price quotation as one relating to greige goods which *when finished by Modern-Aire* would meet the specifications of PA-PD-29. [Tr. II, pp. 447, 625-627, 635-639, 672-682.] This was indicated in appellant’s reply to the initial inquiry of Mr. Mills, as well as in all subsequent negotiations, for appellant always quoted rayon cloth in terms of “specification PA-PD-29 *in the greige.*” [Tr. I, p. 347; Pltf. Exs. 1, 2, 18 and 19.] In this connection, appellant knew that greige goods would not meet specification PA-PD-29 without finishing. However, there was nothing unusual about Mr. Mill’s inquiry for greige goods per specification PA-PD-29 since appellant

was a greige goods house and since cloth in the greige state had to meet certain standards or else it would not meet specification PA-PD-29 even when finished. [Tr. II, pp. 626-627, 638, 677-679.]

Appellant further believed that Mr. Mills also understood that its quotations for "greige goods" as per PA-PD-29 related to cloth which when finished by Modern-Aire would conform to specifications PA-PD-29 [Tr. II, pp. 543-544, 637-639, 678-682], since all through the negotiations Mr. Mills and Mr. Piersol discussed only greige goods. [Tr. II, pp. 431, 434-436, 449, 545.] In this connection, Mr. Mills never once inquired as to the meaning of the term "greige" even though every price quotation relayed to him by appellant referred to "greige" goods.

On the other hand, Mr. Mills claims that his inquiry was for rayon cloth which did meet PA-PD-29. His misunderstanding of this situation was undoubtedly due either to his lack of knowledge of the elementary terms used in the industry in which he sought to engage or in particular to the meaning of the word "greige." Mr. Mills testified that *at the time of the negotiations here in question* he believed "greige" referred to the *color* of cloth rather than to all of its natural characteristics as it came off the loom or before it was finished or processed. [Tr. I, pp. 78-79, 165-178, 183-187.] He also admitted that price was his main concern and *that the fact that some of the replies received by him to his inquiries from other sources quoted on finished goods and others on greige goods* meant nothing to him. [Tr. I, pp. 182-187; Tr. II, p. 572.] It subsequently appeared that Mr. Mills was also unfamiliar with specifications PA-PD-29. [Tr. I, pp. 141-143, 155.]

This basic misunderstanding of the parties did not become apparent until late in March, 1952, although appellant in all of its negotiations with Mr. Mills always quoted goods "in the greige." [Tr. II, pp. 572-573.] Even though he now claims he did not fully understand the terms used

in the textile industry or the purport of PA-PD-29, Mr. Mills by his own testimony made no attempt to seek advice with respect to their meaning. [Tr. I, p. 142.]

When Mr. Mills received the January 10 price quotation he requested that it be held open for 30 days. This was refused and Mr. Piersol informed Mr. Mills that the rayon mills would not commit themselves on a price over an extended period of time. [Tr. I, pp. 194-196, 218; Tr. II, pp. 453-454, 456; Deft. Exs. C and D.]

After this initial quotation, further negotiations continued between Mr. Mills and appellant. In response to new inquiries by Mr. Mills, appellant's Los Angeles office on January 16, 1952 confirmed in writing price quotations on 45½" and 42½" cloth on specification PA-PD-29 *in the greige*. [Tr. I, pp. 80, 196-197; Tr. II, pp. 459-463; Pltf. Ex. 2.] This confirmation did not occur, however, until after Mr. Mills' inquiry had been referred to New York. [Def. Exs. E, F and G.] Mr. Mills again acknowledges that these inquiries and quotations did not amount to a contract. [Tr. I, p. 199.]

Within a few days after receipt of the quotation on the 45½" and 42½" cloth, Mr. Mills continued negotiating as to price and made another inquiry, this time relating to 47½" cloth. [Tr. I, pp. 197-200, 203-205.] After transmitting this inquiry to its New York office and receiving a reply [Deft. Exs. H and I], appellant's Los Angeles office on February 8, 1952, quoted a price to Mr. Mills in writing on the 47½" cloth. [Pltf. Ex. 3.]

During his negotiations with appellant, Mr. Mills also negotiated with the government. At the beginning of February, 1952, the government decided to consider Modern-Aire only for the manufacture of 105 mm. cartridge case liners, and in response Mr. Mills claims he sought and obtained from the government a higher price commitment per unit on this smaller proposal than he had obtained on the larger proposal which included both 75 mm. and 105 mm. liners. [Tr. I, pp. 131-132, 202-203, 221.]

Mr. Mills contends that he next conferred personally with Mr. Piersol on February 6, 1952, after being informed by the government that he was being considered only for a contract on 105 mm. cartridge liners. At this time Mr. Mills claims he personally went over the blueprints and specifications for the 105 mm. liners [Pltf. Exs. 4 and 5] in great detail with Mr. Piersol. [Tr. I, pp. 81-86, 200-201.] Mr. Piersol, however, had absolutely no recollection of such a meeting with Mr. Mills [Tr. II, pp. 466-468] and in fact testified that he was in New York at the time of this alleged meeting. [Tr. II, pp. 461, 545.] The documentary evidence presented at trial corroborated Mr. Piersol in this regard and indicated that between January 16, 1952, and February 19, 1952, Mr. Mills dealt only with Henry Kramer, Mr. Piersol's assistant. [Pltf. Exs. 2 and 3; Deft. Exs. H and I.] It thus appeared that Mr. Pierson had never seen the blueprints or specifications until after the dispute with appellee arose.

It was not until February 19, 1952, that Mr. Mills again dealt with Mr. Piersol, at which time Mr. Mills sought a better price on the 47½" cloth. [Tr. II, pp. 350-356, 469-470.] After Mr. Piersol contacted New York, the quoted price on 125,000 yards of this cloth was reduced from 39¾ cents to 38½ cents. [Pltf. Exs. 20 and 21.] Shortly thereafter Mr. Mills sought a similar price reduction on the 45½" cloth previously quoted in January, having then apparently decided he could best utilize a combination of 47½" and 45½" widths. [Tr. II, pp. 470-472; Deft. Ex. J.] Deering-Milliken's reply was delayed pending confirmation by Mr. Mills that the government would give him a 90% partial payment clause in his proposed contract with the government. [Tr. II, pp. 474-475; Deft. Ex. K.] This clause provided that the government would advance Modern-Aire money to pay for material and labor expenses as they were incurred rather than upon delivery of the finished product by Modern-Aire. [Tr. I, pp. 234-235.]

Mr. Mills had no recollection of any further conversations or meetings prior to March 6, 1952 [Tr. I, pp. 222-226], but the evidence showed conclusively that substantial negotiations continued between the parties during the period of March 3 to March 5, 1952. [Tr. II, pp. 356-358, 365-370, 373-375, 381-383, 386-393, 476-479, Pltf. Exs. 22, 23, 24, 25 and 26.] Although several matters were discussed at this time, all items were left open for further negotiation. [Tr. II, pp. 356-362.]

On March 6, 1952, Mr. Mills went to Mr. Piersol's office and informed him that the government had given its oral assurance that Modern-Aire would get a contract for 105 mm. liners as soon as Mr. Mills presented evidence that he had access to a source of supply of rayon fabric. As an accommodation to Mr. Mills, Mr. Piersol called a Mr. Burns of the government's Ordnance Department and told him that rayon fabric in the greige was available to Mr. Mills. At Mr. Mills' request, Mr. Piersol also wrote two letters to Modern-Aire under the date of March 6, 1952. [Tr. I, pp. 88-92, 227-228; Tr. II, pp. 395-402.] The first stated in part:

“ . . . we have consummated a contract with you for 101,200 yards of 45½” rayon cartridge cloth in the greige as per government specification PXS-1300 and also for 23,900 yards of the same material in 47½” width. . . . This memo is written with the idea of submitting (it) to the Government Procurement Office. . . .” [Pltf. Ex. 6.]

This letter made no mention of price, and Mr. Piersol testified that the particular language used was suggested by Mr. Mills since it was prepared solely for submission to the government. [Tr. II, pp. 395, 403-404, 510-511.]

The other letter was written for Mr. Mills and provided in part:

“ . . . This will confirm our quotation to you of today on 101,200 yards of 45½” rayon cartridge cloth in

the greige as per Specification PXS-1300 at $36\frac{1}{8}\phi$ per yard and 23,900 yards of the same material in $47\frac{1}{2}"$ width in the greige at $37\frac{3}{8}\phi$ per yard, . . . We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it. . . ." [Pltf. Ex. 7.]

Both of these letters quote rayon cloth "in the greige."

Mr. Piersol testified that neither of these letters were intended by him to evidence a contract with Modern-Aire but rather were written at Mr. Mills' request as an indication to the government that rayon cloth in the greige was available to Modern-Aire. [Tr. II, pp. 396, 403, 510-514.] In this connection, Mr. Mills admitted that all the government requested was evidence that he was "able" to secure rayon goods [Tr. I, pp. 222, 236], and he claims to have shown *both* letters to the government. [Tr. I, pp. 93-94.]

Mr. Mills contends that there was a "meeting of the minds" on March 6 and that the letters of March 6th constitute an enforceable contract [Tr. I, pp. 214-215, 228-229]; however, extended negotiations between the parties from March 6 to March 14 with respect to the terms of delivery, the width and quantity of the cloth to be supplied, credit and other essential terms indicate that the letters of March 6th were not intended by either of the parties to constitute a contract. During this period, Mr. Mills unilaterally determined that it would be more efficient and would avoid confusion if he dealt with only one width of cloth. He consequently changed both the quantity and widths discussed on March 6th from a total of 125,100 yards of $45\frac{1}{2}"$ and $47\frac{1}{2}"$ to 126,000 yards of $45\frac{1}{2}"$ minimum width. [Tr. I, pp. 129-131, 229, 260, 263-265.] Notwithstanding the language of the March 6th letters

that delivery was to start "April 25th and spread out to completion" and his contention that these letters amounted to a definite agreement, Mr. Mills admitted that the specific delivery dates were left open for future decision since they were of vital importance to all concerned. In fact, negotiations with respect to delivery continued as late as March 18, 1952. [Tr. I, pp. 229-230, 243-245, 260; Tr. II, pp. 518, 530-531; Deft. Exs. L, P, Q and R.]

It was also during this period of March 6 to March 14 that negotiations in regard to credit took place. [Tr. I, pp. 233-235, 256.] Indeed, appellant would not enter into any agreement with Mr. Mills unless he could establish his credit and so informed Mr. Mills on March 7, 1952. [Tr. II, p. 517; Deft. Ex. M.] On March 10, 1952, Mr. Mills told Mr. Piersol that he had received an advance copy of his contract with the government. At this time Mr. Piersol advised Mr. Mills to call John M. McEwen, appellant's assistant credit manager in New York, in order to establish the necessary credit arrangements. [Tr. I, pp. 94, 254-255; Tr. II, pp. 406-407, 656.] Although his memory was quite vague as to when he called and as to whom he called, Mr. Mills remembered specifically that he explained his 90% partial payment clause to appellant's New York credit man and obtained an approval on terms of net 30 days provided he made a payment of 10% of the total price of the cloth in advance. [Tr. I, pp. 94-95, 234-235, 335-337.]

At the trial Mr. Mills asserted that the required 10% related to an advance "payment" on the claimed executed contract of March 6th which was to be paid upon request rather than as a deposit as security for his performance of a contract which might be made in the future. [Tr. I, pp. 247-248.] In fact, Mr. Mills denied that he even discussed that a formal written contract was to be executed after all negotiations had been completed. [Tr. II, p. 569.] The documentary evidence presented at trial, however,

indicates not only that Mr. Mills knew a formal written contract was yet forthcoming but also that the 10% amount was for security purposes only—in lieu of a letter of credit. [Tr. II, pp. 531, 658-661; Pltf. Ex. 8, Deft. Exs. N, U, V and W.]

Somewhere between March 12 and March 14, Mr. Mills received and signed his contract with the United States [Tr. I, pp. 105-107; Pltf. Ex. 12.] This is the only government contract involved in this case. [Tr. I, pp. 132-133.]

On March 14, 1952, Mr. Piersol, pursuant to Mr. Mills instructions, prepared a "Memorandum of Order" which was entirely changed from the terms mentioned in the letters of March 6th. It differed not only in quantity and widths ordered and delivery dates and credit terms specified but also included detailed shipping instructions and references to what "seconds" were acceptable, matters not mentioned in the March 6th letters. [Pltf. Ex. 8.] Mr. Piersol sent a copy of this order to New York so that a formal "Salesnote" might be prepared if the order was accepted by the mill involved. [Tr. II, pp. 527, 643-644; Deft. Ex. N.] A copy of the order was also sent to Mr. Mills. [Tr. I, pp. 95, 268.] Mr. Mills admits receiving and reading this order. He also admits that he made no objection whatsoever to any of its terms with the one exception that he called a typographical error as to price to the attention of Mr. Piersol. In particular, he made no objection to the words "This order is subject to acceptance or rejection by our mill. This order is subject to the provisions of our Salesnote." or to the words "Net 30 days—10% deposit with contract." [Tr. I, pp. 268-270; Tr. II, pp. 525-526; Deft. Ex. O.]

Notwithstanding his lack of objection to the content of the March 14th order, his extensive negotiations from March 6 to March 14 and the utter difference between the letters of March 6th and the order of March 14th,

Mr. Mills contends that the March 14th order was merely a confirmation of the contract evidenced by the March 6th letters. [Tr. I, p. 212.] Under cross-examination, however, Mr. Mills referred to the March 6th letters as *orders* only and admitted that on March 14 he called and told Mr. Piersol that he had received and signed the government contract and that Mr. Piersol could *now* send in his *order*. [Tr. I, pp. 259-260.] Mr. Mills further admitted that it wasn't until March 14 that he gave Mr. Piersol definite information with respect to the quantity, widths, delivery, shipping and credit which he ultimately decided he wanted. [Tr. I, pp. 260-262.] These admissions corroborated Mr. Piersol's testimony that at no time prior to March 14 did Mr. Mills ever contend that he had given a positive order, let alone a firm contract, to appellant, and that he received his first authorization from Mr. Mills to submit a written order on March 14. [Tr. II, pp. 406, 519-521, 525.]

Prior to this time the government requested Mr. Mills to manufacture a "pilot lot" (sample lot) of 100 cartridge liners, and Mr. Mills asked Mr. Piersol to obtain 50 yards of cloth for this purpose. [Tr. I, pp. 147-148, 203, 257.] Appellant was unable to furnish this material without special processing since it dealt only in greige goods. However, 50 yards of "finished" cloth were obtained and sent to Mr. Mills on March 18, 1952. At this time Mr. Piersol explained to Mr. Mills that this was not a sample of the cloth he had ordered, and Mr. Mills acknowledged that he was buying "greige" goods rather than "finished" goods. [Tr. I, pp. 272-274; Tr. II, pp. 531-532, 546; Deft. Exs. S and T.]

In the meantime, the Memorandum of Order dated March 14 had been received in appellant's New York office. Before appellant would recommend that the mill accept this order or prepare a formal written contract, New York advised Mr. Piersol that they expected Mr.

Mills to forward his check for 10% of the cost of the goods ordered as evidence of his good faith. [Tr. II, pp. 532-533; Deft. Exs. U and W.] In response Mr. Piersol requested of and received from Mr. Mills on March 20 the required check [Tr. I, pp. 96-98, 270, 335-336, 534-535; Pltf. Ex. 9] and gave Mr. Mills a receipt therefor. [Pltf. Ex. 10.] The check was then sent to New York. [Tr. II, pp. 412-417; Pltf. Exs. 29 and 30.] It was never deposited by appellant and was later returned to Mr. Mills. [Tr. I, pp. 270-271, 274.]

During this time New York also advised Mr. Mills that his March 14th order could not be accepted since negotiations had extended for so long a time that the delivery dates requested were no longer available. Mr. Mills authorized different shipping methods and this hurdle was abolished. [Tr. II, pp. 530-531; Deft. Exs. P, Q and R.] However, by March 21, 1952 and before the March 14th order was accepted or a formal contract prepared, it became apparent for the first time to Mr. Lovett of appellant's New York office that Mr. Mills, either through lack of knowledge of textiles and textile terminology or of specification PA-PD-29 itself, believed that the "greige" goods being offered by appellant's mill would meet specifications without further processing by Modern-Aire. [Tr. II, pp. 645, 648-649; 652-653.] In order to clear up any mistaken belief, Mr. Lovett immediately wired Mr. Piersol that the cloth in the greige ordered by Mr. Mills would not meet the specification until "finished" and instructed the Los Angeles office to clarify the mixup and make every effort to conclude the sale of goods as offered. [Tr. II, pp. 683-686; Pltf. Ex. 11.] Mr. Mills and Mr. Piersol interpreted this wire as informing that there would be a delay in the first shipment only. [Tr. I, pp. 98-101, 278-282; Tr. II, pp. 423-426, 535-537.] As a result Mr. Mills sought to have the delivery date for the first shipment of his liners extended by the gov-

ernment, but the government advised that it would be more expeditious if Mr. Mills sought the cloth necessary for his first delivery of liners from another source. [Tr. I, pp. 101-103, 282-283; Tr. II, pp. 428, 538-539.]

Thereafter, Mr. Piersol called Mr. Lovett in New York who clarified appellant's position that New York always knew its greige goods would not meet PA-PD-29 unless finished but believed Mr. Mills had been negotiating for greige goods which he intended to finish or have finished. In his wire to Mr. Piersol, Mr. Lovett made specific reference to the air permeability of greige cloth in order to emphasize to Mr. Piersol, who was not familiar with specification PA-PD-29, and to Mr. Mills the difference between greige goods and finished goods insofar as that specification was particularly concerned. It was Mr. Lovett's hope that even if there had been a misunderstanding, Modern-Aire would still find it to its interest not to cancel its order for greige goods. [Tr. II, pp. 537-538, 625-626, 652-653, 685-686.]

On March 25, 1952, Mr. Piersol in writing demanded that Modern-Aire accept greige goods as ordered or else appellant would consider the order cancelled. [Tr. II, pp. 539-540; Deft. Ex. X.] To this Mr. Mills responded through his attorneys that he had a binding contract for 126,000 yards of finished goods which met PA-PD-29. [Tr. II, pp. 541-542; Deft. Ex. Y.]

Thereafter Mr. Mills advised the government of the situation [Tr. I, pp. 103-104] and sought the help of Howard B. Drake who was in charge of expediting and employed by the government to help the contractor. [Tr. II, pp. 482, 501.] In hope of clarifying the matter, Mr. Drake called Mr. Harris and made a report to Washington [Tr. II, pp. 483, 485, 488], which was based exclusively on information furnished by Mr. Mills after he had consulted with his attorney. [Tr. II, pp. 499-500, 503.]

After the March 21 developments Modern-Aire did not go forward and try to meet its government contract either by purchasing greige goods and processing them further to meet government specifications or by obtaining finished cloth from other firms. While Mr. Mills testified that he attempted to procure the necessary fabric elsewhere [Tr. I, p. 104], he subsequently admitted that he made no actual effort to obtain finished goods [Tr. I, p. 315] other than to seek quotations from three outside firms. [Pltf. Exs. 15 and 16; Deft. Ex. Z.] *One reply quoted a price for the total yardage required by Modern-Aire which exceeded the price quoted by Deering-Milliken by only \$722.50.* [Deft. Ex. Z.] Mr. Mills admitted further that he knew that Deering-Milliken's greige goods would meet specification PA-PD-29 if they were "scoured" and that this process cost but 3¢ a yard. [Tr. I, p. 313.] It is uncontradicted that there were many local concerns easily reached by telephone which were equipped to scour cloth. [Tr. II, pp. 692-693.]

On June 2, 1952 Mr. Mills received notice that the government was terminating its contract with Modern-Aire, not only for Modern-Aire's inability to complete the contract, *but also for its failure to submit a pilot lot.* [Tr. I, p. 110; Pltf. Ex. 14.] On July 8, 1952 the government advised Modern-Aire that it had procured the necessary liners elsewhere at a higher price and demanded payment of \$4,100.66. [Tr. I, p. 107; Pltf. Ex. 13.] Notwithstanding that neither Mr. Mills nor Modern-Aire has ever paid this sum [Tr. I, p. 110] and notwithstanding that the United States has not proceeded in any other manner to either demand or collect this sum, Modern-Aire, in the within action, seeks to recover this amount as part of its alleged damages. Modern-Aire also seeks to recover its estimated future profits claimed to have been lost on the government contract.

The district court agreed with the contention of Modern-Aire that it had entered into a contract with appellant on

March 6, 1952, and found that the letters written by Mr. Piersol on that date constituted an enforceable written agreement. [Findings of Fact* pars. I, II and III; Tr. I, pp. 25-26.] Accordingly it gave judgment in favor of Modern-Aire for the total amount of \$8,522.26. [Tr. I, pp. 33-35.] This amount consisted of the sum of \$4,421.60 as compensation for appellee's estimated loss of profit and the sum of \$4,100.66 to be held in trust for the United States. It is from this judgment which your appellant respectfully appeals.

Specification of Errors.

The errors relied upon and urged by appellant herein are as follows:

1. The finding that on March 6, 1952 appellant and appellee entered into a written contract for the purchase and sale of 126,000 yards of rayon cartridge cloth which was to conform to military specifications designated as PA-PD-29 is conflicting with the other findings of fact and not supported by the evidence. [FF. pars. I and II, Tr. I, pp. 25-26.]

2. The finding that the contract found between appellant and appellee consisted "of two letters written by the defendant to the plaintiff, which said two letters are in evidence as plaintiff's Exs. 6 and 7" is conflicting with the other findings of fact and not supported by the evidence. [FF. par. III, Tr. I, p. 26.]

4. The finding that plaintiff's Exhibit 8, designated Memorandum of Order, was prepared by appellant for the purpose of confirming the fact that a contract had been entered into on March 6, 1952 between appellant and appellee and for the further purpose of confirming certain terms and conditions contained in said contract is con-

*Hereinafter abbreviated "FF."

flicting with the other findings of fact and not supported by the evidence. [FF. par. IV, Tr. I, p. 26.]

5. The following findings are insufficient and not supported by the evidence, to wit: that the cost to appellee of manufacturing the inner assembly liners in accordance with the provisions of its contract with the United States was the sum of \$66,304.88 [FF. par. V, Tr. I, pp. 26-27]; that the total price which the United States promised to pay appellee pursuant to said contract was the sum of \$70,725.98 [FF. par. VI, Tr. I, p. 27]; that pursuant to said contract with the United States plaintiff was entitled to or would have realized a profit of \$4,421.60, and that plaintiff has sustained damage in said amount. [FF. pars. VII and XV, Tr. I, pp. 27, 29-30.]

6. The evidence is insufficient to support the finding that the profit anticipated by appellee was reasonably within the knowledge and contemplation of appellant at all times pertinent herein. [FF. par. I *re*: Compl. par. XXI, Tr. I, p. 13.]

7. The evidence and findings are wholly insufficient to establish that the United States in fact suffered damages in the sum of \$4,100.66 as a result of the breach of the contract found between appellant and appellee. [FF. par. XVI, Tr. I, p. 30.]

8. There is absolutely no evidence to support the finding that the United States will, in due course, proceed against the appellee to enforce payment of the sum of \$4,100.66. [FF. par. I *re*: Compl. par. XXVII.]

9. The Conclusions of Law [Tr. I, p. 32] are conflicting between themselves and do not support the judgment entered herein that appellee recover the sum of \$4,100.66 from appellant, to be held by appellee as trust money for the use and benefit of the United States and immediately upon receipt by appellee be remitted to the United States.

ARGUMENT.

I.

The Findings of Fact With Respect to the Existence of a Contract Are Insufficient, Inconsistent and Conflicting and Not Supported by the Evidence.

Appellant realizes that in order to reverse a judgment on the ground that the evidence is insufficient to support the findings of fact, it must be shown on appeal that there is no substantial evidence in the record which would permit the trier of fact to make such findings. Appellant is also aware of the rule that the appellate court will view the evidence in the light most favorable to the appellee, will indulge in all legitimate inferences in favor of the trier of fact, and will not weigh the evidence. But as was pointed out in *Herbert v. Lankershim*, 9 Cal. 2d 409, 71 P. 2d 220 (1937), at p. 471:

“This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.”

And as was said in *Fewel & Dawes, Inc. v. Pratt*, 17 Cal. 2d 85, 100 P. 2d 650 (1941), at page 89:

“If, however, the evidence is so slight and tenuous that it does not create a real and substantial conflict the finding may be set aside.”

For whatever may have been the rule heretofore as to what evidence is necessary to support a plaintiff's case, it is now well settled that it must be supported by substantial evidence, and that whether or not there is substantial evidence is a question of law for the court. While an appellate court must accept the facts tending to support the judgment as true, yet when the question of their

having sufficient substance to support the plaintiff's case comes in issue, it becomes a question of law alone, as applied to the peculiar facts of the case. (*Guardianship of Sturges*, 30 Cal. App. 2d 477, 497, 86 P. 2d 905 (1939).)

A. The Evidence Is Wholly Insufficient to Support the Finding that Appellant and Appellee Entered into a Written Contract on March 6, 1952.

The district court found that on March 6, 1952 appellant and appellee entered into a written contract pursuant to which appellant agreed to manufacture and deliver 126,000 yards of rayon cartridge cloth which conformed to military specification PA-PD-29. [FF. pars. I and II, Tr. I, pp. 25-26.] Further, this written contract was found to consist of two letters in evidence as Plaintiff's Exhibits 6 and 7.* [FF. par. III, Tr. I, p. 26.] Appellant respectfully submits that neither of these findings are supported by the evidence presented in this case. In this connection, the testimony of Mr. Mills to the effect that "I had an agreement" or that "They understood there was a contract" must be disregarded, for as was specifically held in *Nevills v. Moore Mining Co.*, 135 Cal. 561, 67 Pac. 1054 (1902), such statements are merely conclusions and not competent evidence to support a finding of the existence of a contract.

Accord:

Townsend v. Flotill Products, Inc., 82 Cal. App. 2d 863, 866, 187 P. 2d 466 (1947).

That there was no "meeting of the minds" of the parties and no mutual assent to contract on March 6, 1952 is shown in at least two ways, for the evidence proves conclusively not only that neither of the parties consented to or intended to be bound by a contract on that date but also that the parties did not agree upon the same thing in the same sense.

*As this case turns upon these documents, they are set forth verbatim in the Appendix hereto as No. 1 and No. 2.

1. THE EVIDENCE SHOWS CONCLUSIVELY THAT APPELLANT DID NOT CONSENT TO BE BOUND BY CONTRACT OR INTEND TO ENTER INTO AN AGREEMENT ON MARCH 6, 1952.

It is elementary that before a contract may be found to exist it must be shown that there has been an exchange between the parties of a definite offer for an unconditional acceptance. This is so because a contract is a consensual arrangement based on the mutual assent of the parties. The principle was stated well by the court in *Mahar v. Compton*, 45 N. Y. Supp. 1126, 79 N. Y. State Rep. 1126 (1897) in the following words appearing in its opinion at page 1128:

“ . . . there must have been an exact meeting of minds of the contracting parties in respect to every detail of the proposed contract; and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified by conditions or reservations, however slight they may have been, the universal rule seems to be that no valid contract is thereby established, but that such a modified or qualified acceptance must rather be treated as a rejection of the offer.”

Based on the assent of the parties, mutual consent is absolutely necessary to the existence of a contract. *California Civil Code, Sections 1550(2) and 1565.*

Sackett v. Starr, 95 Cal. App. 2d 128, 133, 212 P. 2d 535 (1949);

Cumming v. Ross, 90 Cal. 68, 71, 27 Pac. 62 (1891);

Marx & Rawolle v. Standard Soap Co., 42 Cal. App. 32, 183 Pac. 225 (1919);

12 Cal. Jur. (2d), *Contracts*, Section 18, p. 208.

The court in *McClintock v. Robinson*, 18 Cal. App. 2d 577, 64 P. 2d 749 (1937) reversed a judgment based on a finding that plaintiff had “purchased” a cabin from the defendant for the reason that there was no evidence

to support such finding. In so doing, the court, at page 582, approved the following language appearing in 6 *Cal. Jur.*, page 41:

“Mutual consent is necessary to the existence of any contract. Assent of at least two minds to each and all of the essentials of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it. One cannot be made to stand on a contract to which he never consented.”

When the foregoing rules are applied to the uncontroverted facts of this case it is immediately apparent that one of the elements of a valid contract is lacking. Appellant vigorously urges that on March 6, 1952 there was no mutual assent—no meeting of the minds—and therefore no contract between appellant and appellee.

The trial court found that two letters written by Mr. Piersol on March 6, 1952, in evidence as Plaintiff's Exhibits 6 and 7, constituted a binding contract between the parties. [FF. pars. I, II and III, Tr. I, pp. 25-26.] That there is no evidence to support such a finding is best shown by the letters themselves, neither of which ever came to the attention of appellant's New York office until after Mr. Mills' attorneys threatened legal action. The language used in each indicates conclusively that neither was intended to evidence a binding agreement.

Mr. Piersol's only purpose in writing the letter designated as Plaintiff's Exhibit 6 was to assist Mr. Mills in obtaining a 90% partial payment clause in his contract with the government and to indicate to the government that rayon cloth in the greige, under the circumstances then existing, was available to Modern-Aire. This is clear by its very terms, for as the last sentence expressly states, “This memo is written with the idea of submitting (it) to the Government Procurement Office.” Furthermore, the important omission of any mention of the *price* of the

goods therein not only affirms that this letter was not intended by the parties to evidence a binding agreement between them but also demonstrates that this letter alone as a matter of law cannot constitute a contract since its terms are incomplete and uncertain as to price.

Schimmel v. Martin, 190 Cal. 429, 213 Pac. 33 (1923).

As was said by the court in *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 35 Pac. 1000 (1894) at page 371:

“It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject matter and parties.”

Plaintiff's Exhibit 7, written at the same time as the above letter, is further confirmation that the alleged “contract” was in fact not intended by anyone to be a contract. The first paragraph of this letter adopts the same language as all the other replies to inquiries for quotations made by Mr. Mills during the preceding three months [see Pltf. Exs. 1, 2 and 3], being merely a written confirmation of the latest price quotation to Mr. Mills. Mr. Mills admitted that these prior written confirmations using the same language were not intended as a contract. [Tr. I, pp. 178-181, 199.]

Moreover, the second paragraph of this letter shows on its face that it is nothing more than an acknowledgment of Mr. Mills' “order” for cloth which was being relayed to appellant's home office in New York. An “order” is in no sense a contract or evidence of a contract, rather it is merely an offer to purchase.

Imported Liquors Co. v. Los Angeles Liquor Co.,
152 F. 2d 549 (9th Cir., 1946);

Stein-Gray Drug Co. v. Michelsen, 116 N. Y. Supp.
789, 794 (1909);

Waxelbaum v. Schloss, 116 N. Y. Supp. 42 (1909).

Finally, the closing portion of the letter shows that at the time these letters were written, the minds of the parties had not met, for it provides, “. . . and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.” To enforce the March 6th letters as an obligation of the parties is to completely ignore the import of these words. By necessary implication Mr. Mills had not then confirmed or given his final assent to the order. So too, appellant was left free to accept or reject the order, when, in the future, Mr. Mills was in a position to confirm it.

The language used in this letter is very similar to that interpreted in *Peerless Glass Co. v. Pacific Etc. Co.*, 121 Cal. 641, 54 Pac. 101 (1898). In that case the seller executed and delivered to the buyer a writing which provided in part as follows: “We have decided . . . to sell you another 500 gross upon the same terms and prices if notified on or before May 1st, conditionally, if we have the ware to sell at that time.” The seller refused to deliver any of the goods referred to in this writing although notified by the buyer prior to May 1st. The court held not only that the language used was insufficient to show a binding agreement between the parties but also that the language used was conditional and that the seller was not bound unless it was also shown that the condition upon which the seller agreed to deliver the goods existed. In the case at bar it has not even been shown that the terms of the March 6th letters were confirmed, let alone that the conditions existed that appellant was able to handle the business.

See also:

Booth v. A. Levy & J. Zentner Co., 21 Cal. App. 427, 131 Pac. 1062 (1913);

Patch v. Anderson, 66 Cal. App. 2d 63, 151 P. 2d 644 (1944);

Restatement of Contracts, Section 25 (Appendix No. 3).

That the two letters of March 6, 1952, were not and were not intended to be a contract even for greige goods is also plainly shown by the testimony of Mr. Mills and Mr. Piersol concerning the circumstances surrounding the writing of these documents. On March 6, 1952, Mr. Mills went to Mr. Piersol's office and informed him tht the government had given its oral assurance that Modern-Aire would get a contract for 105 mm. liners as soon as Mr. Mills presented evidence that he had access to a source of supply of rayon fabric. At this time Mr. Mills was having difficulty in convincing the government that he could even obtain the goods from which he hoped to manufacture the cartridge case liners. As an accommodation to Mr. Mills and with a natural desire to cooperate in the hope of eventually securing a firm order from him, Mr. Piersol dictated the letters here in question. [Tr. I, pp. 88-92, 227-228; Tr. II, pp. 395-402.] This was done at the request of Mr. Mills and the particular language used was that suggested by Mr. Mills. [Tr. II, pp. 395, 403-404, 510-511.]

Mr. Piersol testified that neither of these letters were intended by him or Mr. Mills to evidence a contract with Modern-Aire but rather were written at Mr. Mills' request as an indication to the government that rayon cloth was available to Modern-Aire. [Tr. II, pp. 396, 403, 510-514.] At first Mr. Mills maintained that Army Ordnance wanted evidence that Modern-Aire had definitely obligated itself to purchase the necessary cloth before Modern-Aire would finally be considered for a government contract. [Tr. I, pp. 88-92, 227-228.] This position was obviously untenable since it was clear that the United States would not demand that persons who seek to contract with it irrevocably commit themselves to others before actually receiving a government contract. Finally, after extended cross-examination, Mr. Mills admitted that all the government requested was evidence that he was "able" to secure rayon goods. [Tr. I, pp. 222, 236.] More important, Mr. Mills claims

to have shown *both* letters to Army Ordnance [Tr. I, pp. 93-94], which, if true, indicates that even the government knew that no binding commitment had been made to or by appellant.

The law is settled that a writing which on its face purports to be a contract is nevertheless of no legal effect where it is shown that neither of the parties intended the document to constitute an obligation. Moreover, this lack of intent may be shown by parol evidence even though the writing was meant to influence third persons.

P. A. Smith Co. v. Muller, 201 Cal. 219, 256 Pac. 411 (1927);

New York Trust Co. v. Island Oil & Transport Corporation, 34 F. 2d 655 (2d Cir., 1929);

Buckner v. Leon & Co., 204 Cal. 225, 267 Pac. 693 (1928);

Texas Co. v. Berry Garage, 121 Cal. App. 455, 9 P. 2d 241 (1932).

Such are the facts now before this Court as demonstrated by the uncontroverted evidence above referred to.

It should also be noted that at the time these letters were written, Mr. Mills admitted both that he had not yet received the government contract [Tr. I, pp. 105-107] and that he had not entered into a contract with any of his other suppliers. [Tr. I, pp. 259-260.]

Apart from the very letters here in dispute and the circumstances surrounding their creation, the measure of the existence of a contract is the outward manifestations of the parties themselves. In the case at bar the undisputed conduct of the parties shows without doubt that neither appellant nor appellee mutually assented to be bound on March 6, 1952. Mr. Mills not only *continued to negotiate with Mr. Piersol for at least eight days after the March 6th letters were written* but also admitted that on March

14, 1952 he called Mr. Piersol and told him that the government contract had been signed and that Mr. Piersol could "now" send in Modern-Aire's "order." [Tr. I, p. 259.]

During the period from March 6 to March 14, 1952, Mr. Mills and Mr. Piersol continued to negotiate with respect to each and every term except price contained in the March 6th letters, as well as with respect to many terms not even mentioned in the letters but which were considered to be essential by both parties. In the first place, it was during this period that Mr. Mills ultimately determined in his own mind that it would be more efficient and would avoid confusion if he dealt with only one width of cloth. He consequently changed both the quantity and widths discussed on March 6th from a total of 125,100 yards of 45½" and 47½" cloth to 126,000 yards of 45½" minimum width cloth. [Tr. I, pp. 129-131, 229, 260, 263-265.]

In the second place, Mr. Mills admitted that on March 6, 1952 specific delivery dates were left open for future decision since they were of vital importance to all concerned. The evidence shows that in fact negotiations with respect to delivery continued as late as March 18, 1952. [Tr. I, pp. 229-230, 243-245, 260; Tr. II, pp. 518, 530-531; Deft. Exs. L, P, Q and R.]

It was also during this period that negotiations with regard to credit took place. [Tr. I, pp. 233-235, 256.] Indeed, appellant would not enter into any agreement with Mr. Mills unless he could establish his credit and so informed Mr. Mills on March 7, 1952. [Tr. II, p. 517; Deft. Ex. M.] After receiving this information, Mr. Mills called Mr. McEwen of appellant's credit department in New York. [Tr. I, pp. 94-95, 234-235, 335-337.] While the evidence is conflicting as to what exactly was said by Mr. Mills and Mr. McEwen, the only written memorandum of this conversation indicates that Mr. Mills

told Mr. McEwen that he was going to place an order with Mr. Piersol *sometime in the future* and that Mr. Mills agreed to make a 10% deposit at the time the order was made. [Tr. II, p. 659.] The other evidence presented at trial also shows that Mr. Mills knew a formal written contract was yet forthcoming. [Tr. II, pp. 531, 658-661; Pltf. Ex. 8; Deft. Exs. N, U, V and W.] Moreover, Mr. Mills affirmatively testified that he understood that it was necessary to submit a firm order in writing and that it was also necessary for the acceptance of that order to be in writing. [Tr. I, p. 208.]

Finally, the conduct of the parties on or about March 14, 1952 corroborate the fact that the March 6th letters were not intended or considered by either party to constitute a contract. It was on March 14, 1952 that Mr. Mills finally received and executed his written agreement with the government. [Tr. I, pp. 105-107; Pltf. Ex. 12.] He immediately contacted Mr. Piersol and, by his own testimony, advised Mr. Piersol that he was *now* ready to place an order with Deering-Milliken. [Tr. I, pp. 259-262.] Pursuant to Mr. Mills instructions, Mr. Piersol prepared a written "Memorandum of Order" which was entirely changed from the terms mentioned in the letters of March 6th. It differed not only in quantity and widths ordered and delivery dates and credit terms specified but also included detailed shipping instructions and reference to what "seconds" were acceptable, matters not mentioned in the March 6th letters. [Pltf. Ex. 8.] Mr. Piersol sent a copy of this order to New York [Tr. II, pp. 527, 643-644; Deft. Ex. N] and a copy to Mr. Mills. [Tr. I, pp. 95, 268.] Mr. Mills admits receiving and reading this order. He also admits that he made no objection whatsoever to any of its terms with the one exception that he called a typographical error as to price to the attention of Mr. Piersol. In particular, he made no objection to the words "This order is subject to acceptance or rejection by our mill. This order

is subject to the provisions of our Salesnote.” or to the words “Net 30 days—10% deposit with contract” which would have been prepared if appellant had accepted this order. [Tr. I, pp. 268-270; Tr. II, pp. 525-526; Deft. Ex. O.]

In view of the very language contained in the March 6th letters, the circumstances surrounding their creation and the subsequent conduct of the parties, appellant submits that neither appellant nor appellee consented to be bound by contract or intended to enter into an agreement on March 6, 1952. Consequently, the district court’s finding that the March 6th letters constituted a binding contract between the parties is not supported by the evidence.

2. THE EVIDENCE SHOWS CONCLUSIVELY THAT APPELLANT AND APPELLEE DID NOT AGREE UPON THE SAME THING IN THE SAME SENSE.

Even assuming for the purpose of argument that the evidence is sufficient to show that on March 6, 1952 there was an exchange of a definite and certain offer for an unequivocal acceptance between appellant and appellee, still the evidence is insufficient to support the trial court’s findings that appellant and appellee entered into a contract for the purchase and sale of rayon cartridge cloth which was to conform to military specifications designated as PA-PD-29. [FF. pars. I and II, Tr. I, pp. 25-26.]

A meeting of the minds presupposes that the consent of the parties is mutual. However, “consent is not mutual, unless the parties all agree upon the same thing in the same sense . . .” (Cal. Civ. Code, Sec. 1580.) Besides being mutual the consent of the parties must be free, and it is not free if obtained through mistake. (Cal. Civ. Code, Sec. 1567(5).)

See: 12 Cal. Jur. 2d, *Contracts*, Secs. 13, 53, 58 and 59.

As was held in *Blake v. Mosher*, 11 Cal. App. 2d 532, 535, 54 P. 2d 492 (1936): “In order that there may be

an agreement, the parties must have a distinct intention common to both, and without doubt or difference.”

Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179 (1889);

Mahar v. Compton, 45 N. Y. Supp. 1126, 1128 (1897).

The problem here involved was very well summarized by Professor Corbin in 1 Corbin, Contracts, Sec. 107 (1950) as follows:

“The great majority of contracts are bargaining contracts, the purpose of which is to effect an exchange of promises or of other performances. To attain this purpose, there must be mutual expressions of assent to the exchange. These expressions must be in agreement; but it is not necessary that they shall consist of identical words or identical acts. Their words and acts are called ‘expressions’ because they are external symbols of the thoughts and intentions of one party, symbols that convey these thoughts and intentions to the mind of the other party. The symbols so used by one party may be ill-chosen, or the experience and intelligence of the other party may be so variant from that of the first that the understanding of the second is materially different from that of the first. When this is the case, it can not be said that there has been a ‘meeting of the minds’ or that the parties are in ‘agreement,’ in the sense in which those terms are usually understood.”

The subject matter of the contract found by the district court to exist between the parties is referred to in both of the March 6th letters as “. . . *rayon cartridge cloth in the greige as per government specification PXS-1300*” [Pltf. Exs. 6 and 7.] The significance of the term “greige” was apparently overlooked by the trial court even though in the textile industry it has a well defined and established meaning. As established by an independent

witness, it refers to cloth in its natural state as it comes off the loom. Greige goods are sometimes referred to as “natural” or “unbleached” goods. In contradistinction, “finished” goods are goods which have in some manner been processed after they have been loomed. [Tr. II, pp. 688-690.] These terms are in every day use and elementary to the textile industry and Mr. Piersol, Mr. Lovett and the other employees of appellant so understood and used them. [Tr. I, pp. 347-348; Tr. II, pp. 549-550, 620-622.]

See, Calloway Textile Dictionary, First Edition, p. 167. [Tr. II, p. 690.]

In this connection, Section 1645 of the California Civil Code provides:

“Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.”

Where a custom or trade usage of a term is of general and universal application, the parties entering upon a transaction are *conclusively presumed* to know of it and are bound to acquaint themselves with the usages and language of the trade. Once the usage has been proved to be general, certain and uniform (a question of fact), actual knowledge of it by the parties is immaterial. In the case at bar there is absolutely no evidence that “greige” means anything other than as hereinabove set forth or that it is not of general and universal use in the textile industry. Consequently, appellee is bound by its meaning.

Miller v. Germain Seed Etc. Co., 193 Cal. 62, 69, 222 Pac. 817 (1924);

Hind v. Oriental Products Co., 195 Cal. 655, 667, 235 Pac. 438 (1925);

Gelb v. Automobile Ins. Co. of Hartford, 168 F. 2d 774 (2d Cir., 1948);

Western Petroleum Co. v. Tidal Gasoline Co., 284 Fed. 82, 84 (7th Cir., 1922);

Pastorino v. Greene Brothers, 90 Cal. App. 2d 841, 845, 204 P. 2d 368 (1949);

Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543, 122 P. 2d 3 (1942);

Cf. Fry v. State, 78 N. Y. S. 2d 342 (1948).

Although he had no independent recollection of his first meeting with Mr. Piersol [Tr. I, pp. 162-164], Mr. Mills maintains that he inquired for goods which *when delivered* to him would meet specification PA-PD-29. [Tr. I, p. 76.] The written record of this first meeting, however, shows unquestionably that Mr. Mills asked for quotations on specification PA-PD-29 in *natural* or *unbleached* cloth. [Tr. II, p. 448; Pltf. Ex. 18.] When Mr. Lovett first received Mr. Mills' initial inquiry in New York, he checked with his company's fabric development department where he learned (1) that one of the mills represented by appellant could manufacture greige goods which would meet the specifications when finished, and (2) that the specifications by their very terms called for *finished* goods, free of weighting materials. [Tr. II, pp. 624-626; Pltf. Ex. 5.] As a result, appellant's reply to Mr. Mills' inquiry quoted on "greige" goods, *as did every other quotation ever transmitted to Mr. Mills by Deering-Milliken*. [Pltf. Exs. 1, 2, 18 and 19.]

Appellant deals only in rayon "greige" goods and this is well known to those in the textile industry. [Tr. II, pp. 623-624, 690-691.] Dealing only in such greige goods, appellant interpreted Mr. Mills inquiry for a price quotation as one relating to greige goods which *when finished* by Modern-Aire would meet the specifications of PA-PD-29. [Tr. II, pp. 447, 625-627, 635-639, 672-682.] That this is so is shown by the fact that appellant knew that greige goods would not meet specification PA-PD-29 without finishing and knew that those specifications

called for *finished* goods. Moreover, there was nothing unusual about Mr. Mills' inquiry for greige goods per specification PA-PD-29 since appellant was a griege goods house and since cloth in the greige state had to meet certain standards or else it would not meet specification PA-PD-29 even when finished. [Tr. II, pp. 626-627, 638, 677-679.]

Appellant further believed that Mr. Mills also understood that its quotations for "greige goods" as per PA-PD-29 related to cloth which *when finished* by Modern-Aire would conform to specifications PA-PD-29, [Tr. II, pp. 543-544, 637-639, 678-682] since all through the negotiations Mr. Mills and Mr. Piersol discussed only greige goods. [Tr. II, pp. 431, 434-436, 449, 545.] Appellant's interpretation of Mr. Mills' desires was perfectly consistent with the circumstances then prevailing since Mr. Mills was making inquiry in the name of Modern-Aire, a corporation which for several years had been identified with and done business in the textile industry. [Tr. I, p. 117.] Furthermore, by his own statements and by the very quantity of the cloth for which he made inquiry, Mr. Mills held himself out as being experienced and established in the textile industry.

On the other hand, Mr. Mills claims that his inquiry was for finished rayon cloth which did meet PA-PD-29. His misunderstanding of this situation was undoubtedly due either to his lack of knowledge of the elementary terms used in the industry in which he sought to engage or in particular to the meaning of the word "greige." Mr. Mills testified that *at the time of the negotiations here in question* he believed "greige" referred to the *color* of cloth rather than to all of its natural characteristics as it came off the loom or before it was finished or processed. [Tr. I, pp. 78-79, 165-178, 183-187.] He also admitted that price was his main concern and that *the fact that some of the replies received by him to his inquiries from other sources*

quoted on finished goods and others on greige goods meant nothing to him. [Tr. I, pp. 182-187; Tr. II, p. 572.] Furthermore, it subsequently appeared that Mr. Mills was also unfamiliar with specifications PA-PD-29. [Tr. I, pp. 141-143, 155.]

This basic misunderstanding of the parties did not become apparent until March, 1952, although appellant in all of its negotiations with Mr. Mills always quoted goods "in the greige." [Tr. II, pp. 572-573.] Even though he did not fully understand the terms used in the textile industry or the purport of PA-PD-29, Mr. Mills by his own testimony made no attempt to seek advice with respect to their meaning. [Tr. I, p. 142.]

Normally the mental assent of the parties is not requisite for the formation of a contract; however this is not always the case. One of the well established exceptions to the objective theory of contracts is recognized in Section 71(a) of the Restatement of Contracts and Comment "a" thereof, which read as follows:

"If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.

"Comment:

"a. . . . If the manifestations of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. . . . if a party has no reason to suppose that there is ambiguity, he may assert that his words or other acts bear the meaning that he intended, that being one of their legitimate meanings, and he will not be bound by a different meaning attached to them by the other party."

That this principle is part of the law of California is clear from Section 1649 of the *California Civil Code* which provides:

“If the terms of a promise are *in any respect* ambiguous or uncertain, it *must* be interpreted in the sense in which the *promisor* believed, at the time of making it, that the promisee understood it.” (Emphasis added.)

Peerless Glass Co. v. Pacific Etc. Co., 121 Cal. 641, 647, 54 Pac. 101 (1898);

People v. Nolan, 33 Cal. App. 493, 165 Pac. 715 (1917);

See: Myers v. Tibbals, 72 Cal. 278, 13 Pac. 695 (1887).

Appellant submits that the phrase “rayon cartridge cloth in the greige as per government specification PXS-1300” which is contained in the contract found by the district court is ambiguous since the military specification calls for finished goods, and greige goods and finished goods are by definition entirely different things. This phrase therefore must be interpreted in the sense which appellant innocently and reasonably believed that Mr. Mills understood it. Accordingly, it follows that the trial court’s finding that appellant and appellee entered into a contract concerning cloth which would meet specification PA-PD-29 is not supported by the evidence.

B. The Findings of Fact Concerning the Written Contract of March 6, 1952, Are Fatally Inconsistent, Conflicting and Uncertain.

Because appellant and appellee in fact did not actually reach an agreement *on March 6, 1952*, upon the specific terms and items about which they had been negotiating, appellee has been forced to adopt an untenable position in its attempt to establish a contract on that date. As a result, paragraphs I, II, III and IV of the district court’s findings of fact [Tr. I, pp. 25-26] are inconsistent, con-

flicting and uncertain. These inconsistencies and uncertainties are not immaterial but rather strike at the very heart of appellee's case.

When, as here, the findings of fact are contradictory and uncertain, the judgment rendered thereon cannot stand.

Young v. Enfield, 217 Cal. 662, 20 P. 2d 701 (1933);

Flenbaugh v. Heinrich, 89 Cal. App. 2d 214, 200 P. 2d 580 (1948);

Selig Cahn, Inc. v. Alschuler, 56 Cal. App. 2d 875, 133 P. 2d 671 (1943);

Fanta v. Maddex, 80 Cal. App. 513, 252 Pac. 630 (1926).

1. THE TERMS OF THE CONTRACT FOUND BY THE TRIAL COURT ARE NOT COMPLETE AND CERTAIN.

Before an agreement may be found to be finally settled, it must appear that it comprises all of the the terms which the parties intend to introduce. Further, it must appear that all of the terms are expressed with completeness and certainty. If essential terms are not definite and certain, there can be no binding contract. This rule is set forth as follows in 12 Cal. Jur. (2d) *Contracts*, Section 107, at page 308:

“Whether an express contract is oral or written, there must be certainty and definiteness of language or words used in expressing the terms and in showing a meeting of the minds of the parties as to the terms. No action will lie to enforce the promise of a contract, or to recover damages for its breach, unless the contract be complete and certain; and the rule applies as well to price as to subject matter and parties.”

Hardy v. Hardy, 23 Cal. 2d 244, 143 P. 2d 701 (1943);

Nevills v. Moore Mining Co., 135 Cal. 561, 67 Pac. 1054 (1902);

Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000 (1894);
Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179 (1889);
Federated Income Properties v. Hart, 84 Cal. App. 2d 663, 191 P. 2d 59 (1948);
Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003 (1915).

Appellant realizes that these cases generally apply to ambiguities and uncertainties which appear on the face of the contract; however in view of the trial court's conflicting findings as to the terms of the contract found to exist in the present action, appellant submits that these cases are here controlling.

By virtue of paragraphs I [see par. XII of Compl.] and II of the findings of fact, the trial court found that appellant agreed to manufacture and deliver 126,000 yards of cloth at a price of $36\frac{1}{8}$ cents per yard for a total purchase price of \$45,517.50. Yet by virtue of paragraph III [see Pltf. Exs. 6 and 7] of the findings of fact, the trial court found that appellant agreed to manufacture and deliver 23,900 yards of $47\frac{1}{2}$ " cloth at a price of $37\frac{3}{8}$ cents per yard and 101,200 yards of $45\frac{1}{2}$ " cloth at a price of $36\frac{1}{8}$ cents per yard or a total of 125,100 yards of cloth for a total purchase price of \$45,491.13.

While the total dollar figure difference is not great, the complete inconsistency of the findings of fact is immediately apparent from the difference in unit price, quantity of cloth, width of cloth and total purchase price found to comprise the contract between the parties. These are not insignificant details which can be ignored. On the contrary, they show that the supposed contract of March 6th was in reality not complete and certain. If a contract existed, it either related to 126,000 yards of cloth of a single width at a cost of \$45,517.50 or related to 125,100 yards of cloth of varying width at a cost of \$45,491.13.

From the findings of fact, however, it is impossible to ascertain what the terms of the agreement were.

Malley v. Sierra Manufacturing Co., 118 Cal. App. 2d 643, 258 P. 2d 522 (1953).

More important is the fact that these inconsistencies expose appellee's utter frustration at attempting to discover a theory upon which the existence of a contract might be sustained when in fact the minds of the parties never met. Appellee attained this untenable position since, as Mr. Mills admitted, the exact desires of Modern-Aire with respect to widths, quantity, delivery, shipping and credit were not determined until March 14, 1952. [Tr. I, pp. 260-262.] It was on this date that the parties came as close to a definite agreement as they ever did, for it was on this date that Mr. Mills signed his government contract and first authorized Mr. Piersol to send in his *firm and specific order*. [Tr. I, p. 259.] This order is in evidence as Plaintiff's Exhibit 8. Appellee, however, could not rely on this document as constituting a contract between the parties since it was merely an "order" and provided on its face that it was "subject to acceptance or rejection by our mill." Nor could appellee contend that the March 6th letters constituted an offer and that the March 14th order was an acceptance of the offer because of the complete difference in the terms contained in each document. Rather, as indicated in its pleadings and acknowledged at trial [Tr. I, p. 212], appellee took the position that a definite and certain contract was made on March 6 and that his firm order of March 14 merely "confirmed" that agreement. Although the March 14th order differed in almost every detail from the March 6th letters, the district court apparently adopted this unique theory of appellee. [See FF. par. IV, Tr. I, p. 26.] In so doing, the district court ignored the undisputed evidence that firm orders had to be submitted to New York and the particular textile mill involved for acceptance or rejection.

2. AN AGREEMENT TO ENTER INTO NEGOTIATIONS AND TO AGREE UPON THE TERMS OF A CONTRACT IN THE FUTURE DOES NOT AMOUNT TO AN ENFORCEABLE CONTRACT.

In an attempt to make the terms of the March 6th letters definite and certain and thereby explain the inconsistencies in paragraphs I, II and III of the findings of fact, the trial court found that the March 14th "Memorandum of Order" [Pltf. Ex. 8] was prepared by appellant "... for the purpose of confirming the fact that a contract had been entered into on or about March 6, 1952 . . . and for the further purpose of confirming certain terms and conditions contained in . . ." that contract. [FF. par. IV, Tr. I, p. 26.] As above stated, this was in accord with appellee's announced theory of its case. [Tr. I, p. 212.]

That the March 14th order was prepared by appellant to confirm the fact that a contract had been made on March 6th is clearly unsupported by any evidence since it is conceded that it was prepared at Mr. Mills' request and pursuant to his first authorization to send in a firm order. [Tr. I, pp. 259-262; Tr. II, pp. 406, 519-521, 525.] That this order was prepared to confirm certain terms and conditions contained in the March 6th letters is plainly conflicting with the finding that the March 6th letters constituted an agreement between the parties. [FF. par. III.] By definition, "confirm" means "to render valid by formal assent; ratify . . . to give new assurance of the truth of; verify; corroborate." *Webster's Collegiate Dictionary*, Fifth Edition, p. 212.

In light of the complete difference as to quantity, price, delivery, shipping and other terms contained in the March 6th letters and the March 14th order, it is at once apparent that paragraphs III and IV of the findings of fact are fatally inconsistent. A summary of the terms contained in these documents is here presented:

	<u>Letters of March 6, 1952</u>	<u>Order of March 14, 1952</u>
Quantity	125,100 yards	126,000 yards
Widths	45½" and 47½"	Only 45½"
Price per yard	36⅛¢ and 37⅜¢	36⅛¢
Credit	Net 30 days	Net 30 days—10% deposit with contract
Delivery	Start April 25th—	Start April 18— Arrow Line sailing from Charleston, S.C.
Shipping instructions	None	Goods shipped in bales
Packaging instructions	None	Not more than 5% seconds
Seconds	None	
Purchase price	\$45,491.13	\$45,517.50

If "confirm" means that the March 14th order was an acceptance of an offer of appellant contained in the March 6th letters, as the trial court at one time suggested [Tr. I, pp. 211-213], then it is plain that the findings of fact do not support the judgment rendered herein. Under this interpretation there would simply be no contract since the acceptance was not in the same terms as the offer.

Mahar v. Compton, 45 N. Y. Supp. 1126 (1897);

Marx & Rawolle v. Standard Soap Co., 42 Cal. App. 32, 183 Pac. 225 (1919).

If "confirm" means that the terms and conditions of the contract were made certain for the first time on March 14, 1952, then it must follow that on March 6th the most that the parties did was to agree to agree. This is not only what appellee is driven to contend under its theory of the case, but also what the uncontradicted evidence

shows the facts to be. In the first place, Mr. Mills admittedly continued to negotiate with respect to every item contained in the March 6th letters as well as with respect to new items and terms. Secondly, Mr. Mills did not ultimately decide what he wished to order until March 14. Thirdly, the March 6th letters expressly provide that “. . . the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.” Finally, the March 14th order, prepared at Mr. Mills’ request, differed completely from the letters of March 6th.

In truth, the parties on March 6 not only left all terms open for future agreement but also contemplated that whatever agreement was to be made would be reduced to writing in a formal contract which is called a “Salesnote” in the textile industry. Mr. Mills expressly testified that this was his understanding. [Tr. I, p. 208.] In addition, Mr. Mills admitted that he read the March 14th order and made no objection thereto except as to a two cent error in price. [Tr. I, pp. 268-270.] In particular he made no objection to the following words contained on this order: “This order is subject to the provisions of our Salesnote.” or to the words “Net 30 days—10% deposit with contract.”

Thus, not only the evidence presented at trial, but also the findings of fact made by the court below indicate that on March 6, 1952, the specific terms of their negotiations were yet to be agreed upon by appellant and appellee. At the very most, the March 6th letters found by the trial court to constitute a contract were nothing more than an agreement to agree, if indeed they even reached that position of dignity.

This, however, leaves the findings of fact fatally defective since it is well established that where the essential terms of a preliminary agreement are incomplete and unsettled and it is apparent that the ultimate determination

of the details is deferred until a later date, the preliminary negotiations and agreements do not constitute a contract.

Spinney v. Downing, 108 Cal. 666, 668, 41 Pac. 797 (1895);

Avalon Products, Inc. v. Lentini, 98 Cal. App. 2d 177, 180, 219 P. 2d 485 (1950);

Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000 (1894);

Sherry v. Proal, 131 App. Div. 775, 116 N. Y. Supp. 234 (1909);

Stone Drill Corp. v. Stooddy Company, 4 Cal. App. 2d 367, 40 P. 2d 945 (1935);

Fly v. Cline, 49 Cal. App. 414, 93 Pac. 615 (1920);

Booth v. A. Levy & J. Zentner Co., 21 Cal. App. 427, 131 Pac. 1062 (1913);

Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 117 Pac. 936 (1911).

Since the court found that appellee confirmed the March 6th contract on March 14th by making its terms and conditions specific for the first time, it must follow that the court's finding that a definite contract was made and entered between the parties on March 6th is erroneous since it is contrary to the evidence and fatally conflicting with the other findings of fact made by the trial court.

This principle was applied in *Dillingham v. Dahlgren*, 52 Cal. App. 322, 198 Pac. 832 (1921), an action to recover damages for the breach of an alleged contract for the sale of realty, where the court stated at page 330 of its opinion as follows:

“An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some

matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon . . .”

For yet another reason, the court’s finding that the March 14th order “confirmed” the March 6th contract shows the inconsistencies and uncertainties present in the findings of fact made by the court below. It is equally well established that when it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and it is clear that the parties do not intend that a legal obligation shall arise between them until the writing is made, no enforceable agreement arises until the formal contract is executed. In the present case, the very letters found to constitute a contract between appellant and appellee indicate on their face that the parties understood that the terms of their “agreement” were yet to be determined and Mr. Mills acknowledges that on March 6th he understood that the ultimate contract to be made would have to be reduced to writing. [Tr. I, p. 208.] In this connection, paragraph IV of the findings of fact conclusively establishes that the parties have never entered into a contract for this finding states that the March 14th order confirms the terms and conditions of the March 6th contract. If it confirms that contract in part, it must do so in its entirety and the words appearing on that order (“This order is subject to the provisions of our Salesnote.” and the words “Net 30 days—10% deposit with contract”) cannot be ignored. It has been held many times that such words appearing on a memorandum shows that the memorandum was not intended to constitute a valid and binding agreement between the parties.

Thus, in *Dillingham v. Dahlgren*, 52 Cal. App. 322, 198 Pac. 832 (1921), the court held that the following memo-

randum was not sufficient to evidence an agreement between the parties:

“ ‘A. L. Dahlgren agrees to sell to Evelyn L. Dillingham the following described property.

“ ‘Lots 7 and E $\frac{1}{2}$ 8 Blk. 33 Belmont Add. for the sum of \$3750.00 to be paid as follows: \$100.00 deposit—\$400.00 *on completion of contract* and \$35.00 per month or more including interest at 7%.

“ ‘Seller agrees that he will paint woodwork in kitchen, varnish woodwork in dining and living rooms, also paint porch and steps. Seller agrees to pay for cement walk from house to street, buyer to pay for street work.’ ” (P. 323.)

The court, in approving a statement contained in 13 Corpus Juris 289, Section 100, stated at page 329 of its opinion, as follows:

“ ‘The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement; nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing.’ *The same rule applies whether the preliminary negotiations were oral or in writing, if it manifestly appears that certain parts of the contract are later to be agreed upon and inserted in the formal draft.*” (Emphasis added.)

In the *Dillingham* case the significant words were “\$400.00 on completion of contract.” In the case at bar the March 14th order contains the words “10% deposit

with contract” and the words “This order is subject to the provisions of our Salesnote,” words which are far more certain than those found to be significant in the *Dillingham* case.

Accord:

Co-operative Assn. v. Phillips, 56 Cal. 539, 547 (1880);

Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P. 2d 335 (1953);

Moore v. White, 98 Cal. App. 2d 510, 220 P. 2d 918 (1950);

Restatement of Contracts, Section 26 (Appendix No. 4).

In summary, appellant contends that the findings of fact themselves show that the contract found to exist on March 6, 1952, was in fact incomplete and uncertain on that date. In this connection, the trial court found that the ultimate agreement was for 126,000 yards of 45½" wide cloth. But the court also found that the documents which evidenced the parties' agreement concerned 23,900 yards of 45½" cloth and 101,200 yards of 45½" cloth. The attempt to make these findings consistent and therefore the contract of March 6th certain and complete by finding that the order of March 14th "confirmed" the terms and conditions of the March 6th contract, also must fail. If there had been a definite and certain agreement on March 6th there would have been no necessity for a confirmation of its terms at a later date, yet if the terms and conditions of the contract were not certain on March 6th and were left open for later confirmation, then it seems apparent that the parties reached no agreement on March 6th. It must follow that the findings of fact on their face are inconsistent and conflicting and show that in fact the contract found by the court to exist was incomplete and uncertain and therefore no contract.

II.

The Judgment, Conclusions of Law and Findings of Fact With Respect to Appellee's Damage Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellant sincerely believes and wholeheartedly contends that there was not a definite contract between Deering-Milliken and Modern-Aire for the sale of cloth, greige or otherwise, either on March 6, 1952, or on any other date. If such contention is true, there is, of course, no issue as to the measure or amount of damage. But for the purpose of argument only, appellant here assumes that the evidence is sufficient to support the findings that the parties entered into an agreement on March 6, 1952, and that the inconsistencies in those findings hereinabove noted can otherwise be satisfactorily explained. Even under such assumption, however, appellant submits that appellee is not entitled to recover the type of damage for which it here contends, *i.e.*, (a) future or expected profits and (b) monies allegedly due from it to the United States as damages for appellee's breach of its contract with the United States.

Ever since the celebrated case of *Hadley v. Baxendale*, 9 Exch. 341 (1854), the almost universal measure of general damages in a contract action has been "foreseeability." As stated in that case, recoverable damages are:

" . . . such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it."

It may fairly be said that this measure of damages has been codified in California by virtue of Section 3300 of the California Civil Code which provides:

“For breach of an obligation arising from contract, the measure of damages, *except where otherwise expressly provided by this code*, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.” (Emphasis added.)

As a result of the wording of this code section, the terms “proximate cause” and “ordinary course of things” are used synonymously with “foreseeability” in order to give the concept more meaning.

There is, however, another California code section which specifically applies to the case at bar, *i.e.*, Section 1787 of the California Civil Code. This provision states as follows:

“(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

“(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller’s breach of contract.

“(3) *Where there is an available market for the goods in question*, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.” (Emphasis added.)

Again, it may generally be said that, except as provided in subsection (3), the test of damages is substantially the same as that found in Civil Code Section 3300.

Of course, under all of these authorities special circumstances may exist which justify the recovery of certain items as damages which without the special circumstances would not be recoverable. But as these authorities are interpreted, it is likewise clear that the damages allowed by the district court in the case at bar are against the law.

A. The Trial Court Has Failed to Find That There Was No Available Market for the Goods in Question.

As provided therein, Civil Code Section 3300 does not apply where another measure of damages is provided by statute, and therefore does not control the case at bar since Civil Code Section 1787 specifically defines the measure of damages for breach of a contract for sale of goods. Where there is an available market for the goods in question, the measure of damages is the difference between the contract price and market price of the goods at the time of breach. [C. C. §1787(3).]

It is only in the absence of the availability of a reasonable substitute that any other measure of damage applies in the situation here presented. Consequently, it was incumbent upon the trial court to find that rayon cartridge cloth of the type contracted for was *not* available to appellee at the time appellant allegedly breached its contract with appellee before the trial court could award as damages either expected profit or money claimed by the United States from appellee.

A case almost directly in point is *Grupe v. Glick*, 26 Cal. 2d 680, 160 P. 2d 832 (1945), which was an action to recover damages for breach of warranty. There the defendant contracted to sell oil refining machines to plaintiff. Three machines were delivered and resold by plaintiff before he discovered that they were worthless. At the time of this discovery, plaintiff was "negotiating for and had offers" to sell five additional machines. The court allowed as part of the damage to plaintiff the loss of profits in connection with the three machines already delivered and

resold by plaintiff even though it had not been shown that a reasonable substitute machine was not available on the open market. In doing so, the court recognized that this was an exception to the general rule that the proper measure of damages to be applied is the difference between the contract price and the market price at the time of breach. The justification given for this exception was that *the goods had already been delivered* without knowledge of the breach of warranty. The court was also willing to allow loss of profits as an item of damage for the five machines which had not been delivered if it was shown that there were no reasonable substitute machines available on the open market. However, this was not shown and the court therefore reversed the judgment allowing such profits since *as a matter of law* it could not be said that expected profit was within the contemplation of the parties. In this connection the opinion stated at page 694:

“The award of such profits, however, depends upon the existence of an additional factor upon which the trial court made no findings, namely, the absence of a reasonable substitute in the market. It is clear that if a machine of like quality as that warranted was reasonably available to Grupe, he could have completed the sales for which he was negotiating; in other words the loss of profits from those sales could not be said to have been within the contemplation of the parties under such circumstances. Accordingly, the trial court was required to make a finding as to the availability of a reasonable substitute at the time in question.”

Appellant cites the *Grupe* case as being almost directly in point only because the action was for breach of warranty and not breach of contract in the usual sense. The court therefore was interpreting Civil Code Section 1789(7) rather than Civil Code Section 1787(3). Civil Code Section 1789(7) does not contain the express limi-

tation that there be or not be “an available market for the goods in question” in determining whether expected profits may be recovered as does Civil Code Section 1787(3), but the court nevertheless implied such limitation. It must follow *a fortiori* that the rule of the *Grupe* case as to the necessity of an express finding that there was no reasonable substitute available on the open market should be applied to the case at bar. That this is so was recognized by the within court in *Bercut v. Park, Benziger & Co.*, 150 F. 2d 731 (9th Cir., 1945).

Las Palmas Distillery v. Garrett & Co., 167 Cal. 397, 401, 139 Pac. 1077 (1914);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);

Monaci v. Turner, 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);

El Rio Oils v. Pacific Coast Asphalt Co., 95 Cal. App. 2d 186, 213 P. 2d 1 (1949).

The District Court’s failure to make this essential finding of fact is easily explained, for it is uncontradicted that there was in fact an open market for rayon cartridge cloth which would meet specification PA-PD-29 at the time appellant allegedly breached the contract here in issue. This was proved not only by appellant’s evidence but also by that of appellee’s. [Deft. Ex. Z; Pltf. Exs. 15 and 16.] These exhibits represent quotations on the necessary cloth made to Mr. Mills as a result of his inquiry and therefore also show that he had actual knowledge of the availability of rayon cartridge cloth. One of these replies to Mr. Mills quoted a price for the total yardage required by Modern-Aire which exceeded the price quoted by appellant by only \$722.50. [Deft. Ex. Z.] Since evidence was presented on this issue, it was incumbent for the trial court to expressly find that the cloth was unobtainable on the market before it could award as damages any item other than the difference in the price for which appellant agreed to sell

the goods and the then market price of similar goods. The absence of such finding constitutes reversible error.*

B. The Findings in Regard to Loss of Profits Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellant concedes that there is no longer any doubt that loss of profits may be recovered for breach of contract in proper cases. However, where the profits stem from contracts other than that sued upon or from third, "collateral" sources, such profits are not recoverable unless they (1) are within the contemplation of the parties at the time the contract sued upon is made and (2) can be proved with reasonable certainty.

As to loss of profits, the District Court found by reference to the complaint filed in the trial court that on March 14, 1952, the appellee and the United States entered into a contract whereby appellee agreed to manufacture 459,200 inner assembly liners and the United States agreed to pay \$0.151 for each liner or a total of \$69,339.20 [FF. par. I *re*: Compl. par. IV, Tr. I, pp. 4-5]; that by the terms of the contract with the United States the quantity of liners could vary two per cent (2%) more or less "provided such variation was caused by conditions of loading, shipping, or packing or allowances in manufacturing process." [FF. par. I *re*: Compl. par. V, Tr. I, p. 5]; that by reason of said permitted variation in quantity appellee was authorized to manufacture a maximum of 468,384 liners [FF. par. I *re*: Compl. par. VI, Tr. I, p. 5]; that upon manufacture and delivery of 468,384, the United States would pay a total purchase price of \$70,725.98 [FF. par. I *re*: Compl. par. VII, Tr. I, p. 6]; and that appellant knew or should have known that the terms of appellee's government contract would allow appellee a certain profit and that such

*Appellee acknowledged the proper measure of damages to be the difference in the contract price and market price at the time of breach in its letter of demand mailed to appellant prior to the commencement of the within action. [Deft. Ex. Y.]

anticipated profit was reasonably within the knowledge and contemplation of the parties from January to March 14, 1952. [FF. par. I *re*: Complt. par. XXI, Tr. I, p. 13.] The District Court then went on and specifically found that appellee's cost of manufacturing said inner assembly liners "was" \$66,304.38 [FF. par. V, Tr. I, pp. 26-27]; that the United States agreed to pay appellee a total price of \$70,725.98 [FF. par. VI, Tr. I, p. 27]; and that pursuant to its contract with the United States, appellee would have realized a profit, and accordingly was damaged, in the sum of \$4,421.60. [FF. par. VII, Tr. I, p. 27.]

A discriminating review of these findings shows that they are conflicting and insufficient to support the judgment rendered herein.

1. LOSS OF PROFITS CLAIMED BY APPELLEE ARE TOO REMOTE, SPECULATIVE AND UNCERTAIN TO BE RECOVERED.

Conceding that profits are a proper element of damage, it is fundamental that they must be proved with reasonable certainty. Unless there is an established basis on which to prove that profits would be made and their amount, they must be deemed to be remote and speculative and therefore not recoverable. In this regard, California Civil Code Section 3301 provides:

"No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Mr. Mills is the president and sole owner of appellee, Modern-Aire, and at the time here pertinent had no experience in manufacturing or fabricating textiles. So far as he is concerned, Modern-Aire is a new and unestablished business operating in that part of the textile industry where Mr. Mills denies all but the most limited experience and knowledge. When Modern-Aire was acquired by Mr. Mills, it was, in his words, "a shell of a

company.” It was acquired for the primary purpose of having a medium through which Mr. Mills might seek to obtain government contracts for finished textile items. However, Modern-Aire during all of the time here in question had no employees except a foreman who was hired after March 6, 1952, and in fact never produced a single item until late in 1952 after its negotiations and dispute with appellant when, for a very short time, its facilities were used by Mr. Mills in the manufacture of ladies sportswear. Although contracts for the manufacture of flare parachutes, surgical drapes and 105 mm. and 75 mm. cartridge case liners were all sought from agencies of the United States during the period here in question, the only government contract ever obtained by Modern-Aire was one for 105 mm. cartridge case liners presented in this action as Plaintiff’s Exhibit 12. [Tr. I, pp. 73-74, 116-118, 120-122, 124.]

It is well established as a matter of law that where, as here, the company seeking to recover damages is a new venture without any previous experience in the industry, loss of profits cannot be included as a part of the damages recoverable because there is no base upon which to prove what its profits would have been.

One of the leading cases on this subject is *California P. Mfg. Co. v. Stafford P. Co.*, 192 Cal. 479, 221 Pac. 345 (1923). There the plaintiff-buyer purchased from the defendant-seller a machine (called a “plant”) for making fish oil which he intended to begin to manufacture. The seller warranted that the machine could produce a certain tonnage when in fact it could not. The buyer sought to recover loss of profits on the amounts which, under the warranty, should have been produced. In disallowing such damages as too uncertain, the court said at pages 484-485 of its opinion:

“Another element enters into the consideration. At the time the parties were negotiating for the sale and

purchase of the fishmeal plant in this case, the respondent had not theretofore engaged in the conversion of its fish offal or cannery waste into fishmeal. *It therefore had no experience in the operation of any such plant as it contemplated purchasing. So far as it was concerned, the enterprise was a new undertaking and engaging in a new industry.* The reduction of cannery by-products into fishmeal and fish oil by appellant's process was an entirely new industry invented by the president of the appellant corporation. It would appear unlikely, therefore, that either the appellant or the respondent had in contemplation a warranty by the appellant sufficient to cover anticipated profits which the respondent might realize had the machine the capacity called for by the contract. *As a proposition of law, it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. . . . Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation. . . . The rule is one of necessity. Damages must be certain of ascertainment. If one engages in a new industry, there are no provable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. . . ."* (Citations omitted and emphasis added.)

Gibson v. Hercules Mfg., etc., Co., 80 Cal. App. 689, 252 Pac. 780 (1927).

Accord:

Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App. 2d 568, 126 P. 2d 644 (1942);

Greenwood County v. Duke Power Co., 107 F. 2d 484 (4th Cir., 1939);

32 A. L. R. 120;

99 A. L. R. 938.

As stated in these cases, if an established business is interrupted, past profits and experience furnish the basis for calculating the damage. Where an unestablished and new business is interrupted, there is no satisfactory basis on which to say there would or would not have been a profit realized. In such a case, alleged loss of profits are merely remote, contingent and speculative, existing only in anticipation or at most on paper. Losses are equally possible. The very fact that the District Court found that the government had to pay some \$4,000 over its contract price with Modern-Aire in order to obtain the inner assembly liners indicates, perhaps, that appellee would not have made any profit. That appellee may have made a bad contract with the United States is emphasized, moreover, by Mr. Mills' own testimony that he had absolutely no previous experience in fabricating textiles. [Tr. I, p. 118.]

There are, of course, many cases allowing loss of profit as an element of damage, but appellant has found none which go so far as the trial court did here. All cases allowing profits find that some satisfactory standard has been shown on which to calculate expected profit with reasonable certainty. In some, the court has permitted profits to be established by reference to a related business similarly situated, but even there detailed evidence as to gross sales and probable expenses were required.

See:

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P. 2d 804 (1945).

In the *Grupe* case above referred to (26 Cal. 2d 680, 160 P. 2d 832 (1945)), the California Supreme Court

liberalized this doctrine in but a small degree. As above mentioned, the court allowed, except for inadequate findings, loss of profits on five machines for which the buyer had been negotiating and "had offers" for resales. In other words, the court felt that as limited to these five machines, the buyer had established with reasonable certainty the amount of future sales. As to expenses, the court permitted the plaintiff to rely upon his experience in having *already* sold three machines. To this extent there was at least some past experience upon which to estimate loss of profit. The court refused, however, to go further and allow profits on possible future sales. But this case is not controlling in the case now before the court since here it is uncontradicted that appellee has never manufactured any textile articles while owned by Mr. Mills. [Tr. I, pp. 73-74, 116-118, 120-122, 124.]

Appellee may seek to argue that the authorities above cited have no application for the reason that appellee obtained a definite contract with the government and therefore it is reasonably certain that profits would have been made. Such argument would overlook the fact that profit is the difference between sales price and costs. While the sales price to the government may have been established, there is still no satisfactory basis on which to estimate appellee's probable costs with any degree of certainty whatsoever. Without this, profits are still purely speculative.

Just how speculative these costs are is best shown by the evidence presented at trial. [Tr. II, pp. 576-611.] The only direct evidence of appellee's estimated costs was Mr. Mills' testimony that in his opinion his costs would have amounted to \$57,000. [Tr. I, pp. 110-111, 306-308.] Mr. Mills admittedly had no experience in fabricating textiles and was not an accountant. [Tr. I, p. 118; Tr. II, p. 576.] On cross-examination it was shown that Mr. Mills' estimate of his expenses was at most a guess. His esti-

mate assumed that there would be absolutely no waste material and that he could utilize in his fabricating process all “seconds.” [Tr. II, p. 577.] Relatively small amounts of costs were completely ignored by Mr. Mills in making his estimate. [Tooling \$750, Tr. II, p. 588; Rent for “clicker,” \$28, Tr. II, p. 592.] Only 50% of his estimated fixed overhead was charged as costs on the government contract for the reason that Mr. Mills intended to manufacture other products and thereby spread his fixed cost to these other products. However, it is uncontradicted that no other business was even ever obtained. [Tr. II, pp. 593-598.] Moreover, overhead was based on *only 35 days* of production although Mr. Mills admitted that his government contract would take at least four months. [Tr. II, pp. 598-599.] Mr. Mills’ estimate of expenses *to the trial court* included the minimum labor charge of \$1.00 per hour which was shown to be below the union scale of \$1.25 per hour. It was shown, however, that Mr. Mills had estimated *to the government* that he would pay union scale rates of \$1.25 per hour. His labor cost estimate did not include any margin for strikes, breakdowns or other unforeseen events. [Tr. II, pp. 603-604.] Mr. Mills’ estimate made no provision for an inspection of the cartridge case liners after they were manufactured, although it was obvious that his product had to meet rigid government specifications. [Tr. II, p. 608.] Mr. Mills’ cost figures assumed that it would take an average of .837 minutes to produce each unit [Pltf. Ex. 17]; however, Mr. Mills himself testified that it would have taken approximately three hours to produce 100 units, which is 1.80 minutes per unit. [Tr. I, p. 149.] It might also be noted that the cost of the material as set forth in the contract found by the court to exist between appellant and appellee [Pltf. Exs. 6 and 7] differs in amount from that on which Mr. Mills based his estimate. [Pltf. Ex. 17.]

Even though Mr. Mills actually submitted cost figures to the army before he obtained the government contract here in question [Tr. I, pp. 192-194], he maintained at trial that the only written record which he had bearing upon the subject was an estimation of costs prepared by himself *after* the dispute with appellant arose [Tr. I, pp. 238-240, 304-305; Pltf. Ex. 17] for use by his counsel. [Tr. II, pp. 574-575.] This document of course substantiated Mr. Mills' claim that his estimated expenses would have been \$57,000; however, the typewritten figures which had been scratched out in pencil on the reverse side of the document showed an estimated cost of producing 459,200 rayon liners which was from \$8,000 to \$9,000 greater than that to which Mr. Mills testified. Mr. Mills *denied* that these latter figures related in any manner to his government contract [Tr. II, pp. 590-591], *even though it subsequently appeared that they were identical in every detail with the estimate of costs submitted by him to the government.* [Deft. Ex. CC.]

Mr. Mills' apparent inability to recall that the cost figures which he submitted to the government were some \$8,000 to \$9,000 greater than those he prepared *after* the dispute with appellant arose in itself shows the highly contingent and speculative nature of future profits. The facts of this case present the very reason for the rule that as a matter of law future profit may not be recovered where the plaintiff is an unestablished business without any past experience on which even an approximate calculation of the amount of expected profit can be made. The evidence in this regard must approach, at least, the area of reasonable certainty.

In the case at bar the only testimony presented was the estimate of Mr. Mills. Since his estimate was not based on any provable data, there is no sufficient evidence to support the lower court's finding in regard to loss of profits. This was specifically held in *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (8th Cir., 1901).

where the court stated in regard to very similar testimony, at page 102:

“Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts.

Fireside Marshmallow Co. v. Frank Quinlan Const. Co., 213 F. 2d 16 (8th Cir., 1954);

United States v. Griffith, Gornall & Carman, Inc., 210 F. 2d 11 (10th Cir., 1954);

White River Sheep Co. v. Barkley, 288 Pac. 1029, 1033, 37 Ariz. 60 (1930).

See also:

Monaci v. Turner, 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);

Stephany v. Hunt Brothers Co., 62 Cal. App. 638, 217 Pac. 797 (1923);

McCormick, Damages, Sec. 29, p. 109.

For these reasons appellant respectfully submits that the findings of fact in regard to appellee's estimated cost [FF. par. V, Tr. I, pp. 26-27] and therefore the amount of expected profit [FF. par. VII, Tr. I, p. 27] is insufficient under the law and not supported by sufficient and competent evidence.

2. THE FINDINGS OF FACT WITH RESPECT TO GROSS RECEIPTS ARE INCONSISTENT AND NOT SUPPORTED BY THE EVIDENCE.

Assuming that loss of profits is a proper element of damages in the within action, the trial court was required to find the amount of appellee's estimated gross receipts (in this case the price the United States had agreed to pay for the inner assembly liners) and the amount of appellee's estimated expenses, in order to calculate the estimated prospective profits of appellee. In this connection, the District Court specifically found that under its contract with appellee the "*United States promised and agreed*" to pay appellee a total of \$70,725.98. [FF. par. VI, Tr. I, p. 27.] *There is absolutely no evidence to support this finding of fact.* The government contract with appellee is in evidence with this case [Pltf. Ex. 12] and specifically provides that appellee was to manufacture 459,200 inner assembly liners, for which the United States agreed to pay a total of \$69,339.20.

The trial court's error in this regard no doubt occurred as a result of appellee's over-zealous contentions and expectations as to its expected profits. Appellee alleged in its complaint that under its contract with the United States it had agreed to manufacture 459,200 inner assembly liners and that the United States had agreed to pay a total purchase price of \$69,339.20. [Complt. par. IV, Tr. I, pp. 4-5.] Appellant further alleged that the terms of the government contract provided that the quantity of liners could vary 2% more or less "*provided such variation was caused by conditions of loading, shipping or packing or allowances in manufacturing process*" [Complt. par. V, Tr. I, p. 5]; that by reason of such permitted variation appellee was "*authorized*" to manufacture a maximum of 468,384 inner assembly liners [Complt. par. VI, Tr. I, p. 5]; and that upon the manufacture and delivery of the maximum amount of liners, the United States "*would pay*" a total

purchase price of \$70,725.98. [Complt. par. VII, Tr. I, p. 6.] In its findings of fact the trial court expressly found that each of these allegations were true. [FF. par. I, Tr. I, p. 25.] It becomes at once apparent that these findings are not supported by the evidence, are insufficient and conflict with the specific finding that the government "*promised and agreed*" to pay \$70,725.98.

To begin with, the findings made by the District Court by reference to the allegations of the complaint, state as a fact that the United States "promised and agreed to pay" \$69,339.20 but that under certain conditions the United States "would pay" a total of \$70,725.98. The specific finding made by the court is that the United States "promised and agreed" to pay \$70,725.98. The inconsistency in these findings is obvious. In the second place, appellee's government contract was for a basic quantity of 459,200 inner assembly liners. While the contract provided for a plus or minus variation in quantity of 2% it did so only where such variation was caused by conditions occurring in appellee's manufacturing process. There is no finding of fact that these conditions ever occurred nor any evidence to support such finding. Indeed, such finding could not have been made since appellee never started to manufacture the inner assembly liners. Whether or not there would have been a 2% plus variation or a 2% minus variation is purely speculative. It is just as possible that appellee would have manufactured 2% less than the specific amount contracted for. Appellant therefore submits that even if it be determined that appellant has entered into a contract with appellee, that appellant has breached that contract, and that expected profits may be awarded as an item of damage to appellee, nevertheless the District Court's calculation of appellee's prospective profit was, as shown by the uncontradicted evidence and the findings themselves, excessive in the amount of \$1,386.78. Consequently, appellee's loss of profits amounted to, at most, \$3,034.82, even if it be conceded that appellee has estab-

lished the amount of its estimated costs with a reasonable degree of certainty.

Flenbaugh v. Heinrich, 89 Cal. App. 2d 214, 200 P. 2d 580 (1948).

C. The Findings, Conclusions and Judgment With Respect to the Money Claimed by the United States Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellee also seeks to recover as damages a penalty for which it is allegedly liable to the United States for having breached its contract with the United States. As to this element of damage, the District Court found that appellant knew or should have known that if it breached its agreement with appellee, the United States would terminate its contract with appellee and would charge appellee for any and all damages sustained by the United States by reason of appellee's failure to perform its contract with the United States [FF. par. I *re*: Compl. par. XXIV, Tr. I, p. 14]; that the United States "demanded" that appellee pay to it the sum of \$4,100.66, "the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon" [FF. par. XVI, Tr. I, p. 30]; that except for appellant's breach of its contract with appellee, the United States would not have made a claim against appellee for the payment of said \$4,100.66 [FF. par. XVII, Tr. I, p. 30]; and that appellee "believes" that the United States "will, in due course, proceed against (appellee) in the manner and form provided by law, to enforce payment of said sum of \$4,100.66." [FF. par. I *re*: Compl. par. XXVII, Tr. I, p. 15.]

1. THE CONCLUSIONS OF LAW AND THE JUDGMENT WITH RESPECT TO THE MONEY CLAIMED BY THE UNITED STATES ARE INSUFFICIENT, INCONSISTENT AND CONTINGENT.

From these findings of fact with respect to the money claimed by the United States, the District Court concluded

that the plaintiff (appellee) was entitled to judgment against the defendant (appellant) for damages in the sum of \$8,522.26 (the amount of the claim of the United States plus the amount of appellee's estimated future profits) with interest thereon at the rate of 7%. [Concl. of Law, par. I, Tr. I, p. 32.] Paragraph II of the Conclusions of Law [Tr. I, p. 32] is so unique that it is here set forth in full:

“That the sum of \$4,100.66, being the amount of the claim and demand made by the United States of America against the plaintiff, is a sum which, *if due and owing*, is payable by the defendant, and that said amount is a trust fund or trust monies to be held as such *by the defendant* for the use and benefit of the United States of America.” (Emphasis added.)

The judgment rendered by the District Court [Tr. I, p. 34] upon these conclusions of law ordered that plaintiff “do have and recover” from defendant the sum of \$8,522.-26, together with interest at the rate of 7%. The judgment then provided in part as follows:

“. . . that from said amount the sum of \$4,100.66 be *held by the plaintiff* as trust monies for the use and benefit of the United States of America and *immediately upon receipt by plaintiff be remitted to the United States.*” (Emphasis added.)

The several inconsistencies between the conclusions themselves and the conclusions and the judgment are plain and render the same wholly invalid and of no effect. In the first place, both the conclusions and the judgment are in the present tense in the sense that damages in the sum of \$8,522.26 are awarded *forthwith* to appellee. Yet paragraph II of the Conclusions of Law is wholly speculative and contingent, stating that the sum of \$4,100.66 claimed by the United States is payable by appellant only “if due and owing.” In the second place, although judgment is given forthwith to appellee for the whole amount, para-

graph II of the conclusions states that the amount claimed by the United States should be held in trust *by appellant* for the use and benefit of the United States. Notwithstanding these conclusions, the judgment states that the sum should be held *by appellee* as trust monies for the use and benefit of the United States. There is a further inconsistency in that while the judgment states that the sum of \$4,100.66 is to be held by the plaintiff in trust, it further provides that immediately upon receipt by the plaintiff, said sum be remitted to the United States. As a by-product of these inconsistencies, appellee has been awarded interest at the rate of 7% per annum on the total amount of the judgment, to wit: \$8,522.26, even though it appears that it was the intent of the trial court to award \$4,100.66 of that judgment directly to the United States.

Apart from these inconsistencies, the conclusions of law are insufficient to support the judgment awarding \$4,100.66 to the United States. The sole conclusion made by the District Court in this regard is "that the sum of \$4,100.66, *if due and owing*, is payable by . . ." appellant. By participial reference only this sum is described as "being the amount of the *claim and demand* made by the United States" against appellee. It thus appears that the trial court not only failed to conclude that any sum is presently due and owing to the United States, but also expressly left the matter open. Nor is there a conclusion or finding that the United States has in fact been damaged. The conclusions here made refer to the \$4,100.66 merely as a sum which was claimed and demanded by the United States from appellee. Such is not enough to establish liability to the United States either on the part of appellee or appellant let alone support a judgment ordering that appellant forthwith pay to appellee \$4,100.66 and that immediately upon receipt by appellee be paid to the United States.

The conflicts here presented are neither insignificant nor immaterial, but rather render the conclusions and judgment made by the trial court totally insufficient and erro-

neous. They also emphasize the difficulty faced by appellee in attempting to establish as an element of damage that which is wholly remote, speculative and contingent and which could not be proved with any degree of certainty.

Young v. Enfield, 217 Cal. 662, 20 P. 2d 701 (1933).

2. DAMAGES FOR WHICH APPELLEE MIGHT BE LIABLE TO THE UNITED STATES WERE NOT WITHIN THE CONTEMPLATION OF THE PARTIES.

Appellant does not contend that the amount of liability incurred on a collateral contract with a third party can never be recovered as an element of damage. However, appellant does contend that such damage may be allowed only under very exceptional circumstances, since as a general rule, damages to persons not parties to the contract in question cannot be considered as the natural consequences of its breach.

With respect to the money claimed by the United States, the trial court did not specifically find that this item was within the contemplation of appellant and appellee at the time they contracted on March 6, 1952, as it did with respect to future profit. [FF. par. I *re*: Compl. par. XXI, Tr. I, p. 13.] In this connection, the trial court found that except for appellant's breach of its contract with appellee, the United States would not have made a claim against appellee for the payment of \$4,100.66. [FF. par. XVII, Tr. I, p. 30.] Although this finding establishes that appellant's conduct *in fact* caused the United States to make a claim upon appellee, it is wholly inadequate to show that the alleged detriment to the United States was *proximately* caused by appellant's action or *in the ordinary course of things* would be likely to result therefrom. Of course, causation in fact is necessary for liability, but causation in fact is alone insufficient to establish liability.

California Civil Code, Sec. 1787.

The only other finding made by the trial court on this issue of the case states that appellant knew or should have known that if it breached its agreement with appellee, the United States would, under and pursuant to the statutes provided therefor, terminate its contract with appellee and would charge appellee for any and all damages sustained by the United States by reason of appellee's failure to perform its contract with the United States. [FF. par. I *re*: Compl. par. XXIV, Tr. I, p. 14.] This finding is also inadequate to establish that appellee's possible liability to the United States was within the contemplation of appellant and appellee at the time they contracted on March 6, 1952, since there is no finding that appellant knew the goods contracted for could not be obtained elsewhere. Where the alleged detriment stems from "collateral" sources, not directly connected with the particular contract sued upon, this is absolutely necessary.

Marcus & Co. v. K. L. G. Baking Co., 3 A. 2d 627, 122 N. J. L. 202 (1939);

Agabiti Bros. v. Cantana, 86 A. 2d 592, 18 N. J. Super. 45 (1952);

Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N. Y. 33, 173 N. E. 913 (1930);

See also:

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171 (1903);

McGuire v. Osage Oil Corporation, 55 S. W. 2d 535 (Texas, 1932);

Snell v. Cottingham, 72 Ill. 161 (1874).

If it be determined that these findings are sufficient to show that the claim made by the United States was within the contemplation of the parties at the time they contracted, appellant answers that the evidence does not support such finding. Absolutely no evidence was presented that appellant had any knowledge either of the terms of the agreement or of the statutes, if any, under and pursuant to

which the United States would terminate said contract. Moreover, the uncontradicted evidence indicates that there was an available market for rayon cartridge cloth of the type which formed the subject matter of the contract between appellant and appellee. [Pltf. Exs. 15 and 16; Deft. Ex. Z.] Since a reasonable substitute was available it follows that it was not foreseeable that appellee would breach its contract with the United States even if appellant failed to deliver the goods as agreed.

At most the evidence shows that at the time appellant and appellee supposedly contracted, appellant knew that appellee intended to attempt to consummate a contract with the United States. Mere knowledge of such a resale contract, however, is insufficient as a matter of law to establish that the terms of that contract were within the contemplation of the parties at the time they contracted.

J. M. Hays Wood Products Co. v. Simmons Saddle Co., 213 Mo. App. 434, 255 S. W. 973 (1923);

Macchia v. Megow, 355 Pa. 565, 50 A. 2d 314 (1947);

Arkwright Mills v. Clearwater Mfg. Co., 61 S. E. 2d 165 (S. C., 1950).

As it turned out, appellee did contract with the United States; however, this did not happen until eight days after appellant and appellee had supposedly entered into their alleged agreement. Furthermore, the terms of the government contract were never brought to appellant's knowledge even after it had been executed. More important, it was not shown that at the time they are alleged to have contracted appellant had any knowledge of special circumstances which might have indicated to appellant that appellee would be unable to perform its contract with the United States, as, for example, that appellee was not a going concern fully equipped to produce cartridge case liners or that Mr. Mills had but little experience in the

textile industry and might therefore be unable to make adequate substitute arrangements for the required rayon cloth. On the contrary, the evidence which was produced indicated that appellant thought it was doing business with a well established concern. During all of his negotiations with appellant, Mr. Mills made inquiry in the name of Modern-Aire, a corporation which for many years had been identified with and done business in the textile industry. [Tr. I, p. 117.] Also by the very quantity of cloth for which he made inquiry, Mr. Mills held himself out as being established and experienced in textiles.

In summary, appellant contends that the findings of fact are insufficient to show that at the time they contracted, the parties contemplated that if appellant failed to supply rayon cloth to appellee, appellee would be forced to breach its contract with the United States and appellant would indemnify appellee for any damages suffered to the United States. But even if the findings of fact are adequate to establish this, appellant submits that such findings are not supported by the evidence presented at trial.

3. THE FACT OF APPELLEE'S LIABILITY TO THE UNITED STATES HAS NOT BEEN ESTABLISHED.

The United States is not a party to this action and therefore any determination herein is in no sense binding upon it. But apart from this, it has not been established either by the evidence, findings of fact or the conclusions of law that appellee is even liable to the United States. In its complaint appellee was very careful never to allege that it actually breached its agreement with the United States or that it was in any manner or degree presently liable to the United States. Nor do the findings of fact state that appellee breached its contract with the United States. The closest the findings of fact come in this regard is that it is found that the United States "demanded" that appellee pay to it a certain sum and that except for *appellant's* breach the United States would not have made

“claim” against appellee. [FF. pars. XVI and XVII, Tr. I, p. 30.] Appellee’s extreme caution in this regard is exemplified most apparently in paragraph II of the conclusions of law [Tr. I, p. 32] where it is concluded that the sum of \$4,100.66 is an amount which “if due and owing” is payable by appellant.

A final indication of appellee’s unwillingness to admit that it is in fact liable to the United States is found in paragraph XXVII of its complaint. [Tr. I, p. 15.] There appellee alleged that it “believes” that the United States “will, in due course, proceed against (it) in the manner and form provided by law, to enforce payment of said sum of \$4,100.66.” There is, however, no allegation that appellee believes the position taken by the United States is valid or that it has no defense against a possible law suit by the government. Although there is absolutely no evidence in the record as to what the United States has done or intends to do in the future to enforce its “claim,” the trial court found these allegations to be true. [FF. par. I, Tr. I, p. 25.]

Before appellee may recover for amounts which it allegedly owes to third persons at least *the fact* of liability must be established and this liability must be absolute.

Maryland Coal & Coke Co. v. Quemahoning Coal Co., 176 Fed. 303, 308 (4th Cir., 1909).

There are but a few cases throughout the United States which have even gone so far as to allow a plaintiff in a normal contract action to recover as an item of damage for breach of the contract amounts which the plaintiff was required to pay to third persons. In each of these cases, however, at least the *fact* of liability was established.

House Grain Co. v. Finerman & Sons, 116 Cal. App. 2d 485, 253 P. 2d 1034 (1953);

O’Connell v. Main Etc. Hotel Co., 90 Cal. 515, 27 Pac. 373 (1891).

As pointed out in the Restatement of Contracts, Section 334, there are many instances where the costs of litigation or the amount of settlement paid by a buyer to his sub-purchaser may be recovered against the original seller. These cases, however, must be distinguished from the precise facts presented by this appeal, for each of those cases dealt with a type of promise which could be said to “run” to the sub-purchaser, *e.g.*, a warranty of fitness, a covenant of quiet possession or a guarantee of endorsements. All of these promises are in the nature of an indemnity—at least to the extent that the original seller had reason to believe that his buyer would sell or transfer the goods and make the same promise to his sub-purchaser.

More significant, in the breach of warranty type case the liability of the buyer is clearly established from the mere fact that the buyer made a contract with his sub-purchaser and that the original seller breached the contract with his buyer. This is so because the very same promise is contained in both contracts. If the original seller breached his contract, it necessarily follows that the buyer breached his. But that is not the situation now before the court since appellant’s promises to appellee are completely different from appellee’s promises to the United States. Thus, even if it be determined that appellant breached its contract with appellee, it does not follow that appellee is liable to the United States.

Under the pleadings and findings of fact, as above indicated, appellee has not admitted liability to the United States. In this connection, appellant feels constrained to point out that appellee might not in fact be liable to the United States since General Provision 11(b) of the government contract [Pltf. Ex. 12] appears to provide a complete defense under appellee’s theory of its case. What other defenses appellee may have are unknown.

Equally important is the fact that there is no finding or conclusion that the United States has been actually

damaged. In this connection, paragraph XVI of the findings [Tr. I, p. 30] provides that the United States demanded that appellee pay to it the sum of \$4,100.66, "the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon." Paragraph II of the conclusions [Tr. I, p. 32] refers to said sum as "being the amount of the claim and demand made by the United States against the plaintiff." Both of these references are completely inadequate to establish that the United States has been in fact damaged since they are merely statements by way of descriptive recital or by participial reference.

Vilardo v. County of Sacramento, 54 Cal. App. 2d 413, 129 P. 2d 165 (1942).

Appellant is not urging a technicality in this regard but believes that in the complete absence of any admission by or finding that appellee was in fact liable under its contract with the United States or that the United States was in fact damaged, it is unfair to appellant to hold it responsible for this alleged detriment since it is only by relation through the appellee that appellant may be held answerable at all.

Whether or not the government will take any steps to enforce its claim against appellee is problematical. In truth, the United States knew of the within action from its very inception but for more than two years has taken no action either directly against appellee or as an intervenor in the within suit. Before appellee may be compensated in this regard, it must be shown that it has suffered some actual loss, or that as a reasonable probability such loss will occur.

4. THE AMOUNT OF APPELLEE'S ALLEGED LIABILITY TO THE UNITED STATES HAS NOT BEEN ESTABLISHED WITH ANY REASONABLE CERTAINTY.

Even if it be assumed that appellee is in fact liable to the United States, still the evidence, findings and conclusions are insufficient to support that portion of the

judgment ordering a trust fund be created for the benefit of the United States. The findings of fact [FF. par. XVI, Tr. I, p. 30] and the only evidence in point [Pltf. Ex. 13] show only that the United States has "demanded" \$4,100.66 from appellee. A mere demand however is wholly incompetent to establish the actual amount of damage to the government.

As stated in 14 Cal. Jur. 2d *Damages*, Section 18, page 647:

"The mere fact that a third party has demanded payment by the plaintiff of a particular liability is not in itself sufficient to support an award of damages therefor, for that party may never attempt to force the plaintiff to satisfy his alleged obligation."

The case of *Pacific Pine Lbr. Co. v. W. U. Tel. Co.*, 123 Cal. 428, 56 Pac. 103 (1899) is cited as supporting the above quoted principle. In that case the California Supreme Court affirmed the trial court's sustaining of a demurrer to the complaint which sought as an item of damage amounts for which plaintiff alleged that it would be liable to a third person because of the defendant's breach of contract with the plaintiff. It was alleged in the complaint that the third person "demanded" of plaintiff \$1,000 and "threatened" to sue the plaintiff. The plaintiff also alleged that he had no defense to the suit and would have to pay the third party (something which appellee has not done here). The court nevertheless denied relief in the following words, at page 431:

Assuming that plaintiff was liable to the third person, ". . . the complaint shows that the plaintiff has not discharged its liability to (the third person), nor has the latter taken any steps to enforce it, further than to make demand. He may never do so. Under such circumstances we do not think that the complaint states a cause of action against defendant."

Cf. McQuilkin v. Postal Tel. Cable Co., 27 Cal. App. 698, 151 Pac. 21 (1915).

In conclusion, appellant submits that even if it be conceded for purposes of argument that the findings of fact show that appellee was in fact liable to the United States for the definite sum of \$4,100.66, the judgment rendered thereon cannot stand because there is no evidentiary support for such findings. The only evidence presented by appellee was a letter written by the United States to appellee claiming that appellee owed the United States \$4,100.66. [Pltf. Ex. 13.] To the extent that this letter was mailed to and received by appellee, appellant made no objection to it being introduced in evidence. Appellant, however, did point out to the trial judge that as evidence of the truth or falsity of the matters asserted therein this letter was purely hearsay. On that basis only it was admitted into evidence. [Tr. I, pp. 107-109.]

No other evidence whatsoever was offered by appellee to establish the amount of its liability to the United States. As exemplified by the very facts of this case, the amount claimed to be due by prospective plaintiffs is quite often excessive and it is not unreasonable to assume that the United States demanded of appellee a greater amount than it could actually prove it was entitled to under the law. At least in the absence of any competent evidence to establish the amount of the claim of the United States with a reasonable degree of certainty, appellant submits that the trial court's finding with respect to the \$4,100.66 is wholly without evidentiary support.

California Civil Code, Sec. 3301;

Monaci v. Turner, 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);

Stephany v. Hunt Brothers Co., 62 Cal. App. 638, 217 Pac. 797 (1923);

Bumby Metals v. Spalding Foundry Co., 89 Ga. App. 464, 79 S. E. 2d 568 (1953).

Conclusion.

For the reasons and upon the grounds hereinabove set forth, appellant respectfully urges the Court to reverse the judgment of the district court.

One of appellant's primary contentions is that it never entered into a contract with appellee for any type of cloth either on March 6, 1952, or thereafter. The evidence is wholly insufficient to support the contrary conclusion of the trial court, since the very language used in the purported contract and the admitted conduct of the parties themselves show without doubt that neither appellant nor appellee ever intended to bind themselves by contract. Moreover, the uncontradicted evidence shows that from the beginning of their negotiations a basic misunderstanding existed between appellant and appellee which prevented them from agreeing upon the same thing in the same sense.

Even if there were sufficient evidence to sustain the conclusion that appellant and appellee entered into a binding agreement, the findings of fact made by the trial court in this connection are fatally inconsistent and conflicting. These findings show on their face that the alleged contract was in fact neither certain nor complete but rather at most amounted to an agreement to enter into negotiations and in the future to execute an enforceable written contract.

Appellant's second basic contention is that the trial court erred in allowing appellee to recover (a) its claimed loss of profit on the government contract and (b) the amount the United States claimed from appellee for breach of its collateral contract with the United States, even assuming that appellant and appellee entered into a definite contract. The proper measure of damages to be applied for breach of a contract for the sale of goods is the difference between the contract price and the market price of the goods at the time of breach unless it be established that the goods were not obtainable on the open market. Appellant presented evidence not only that the necessary rayon fabric was ob-

tainable on the open market but also that appellee knew that such cloth was available. The trial court's failure to make a finding in this regard therefore constitutes reversible error.

Assuming that the trial court was not required to find that the requisite rayon cloth was not available on the open market, the elements of damage awarded appellee were nevertheless improper under the law of this jurisdiction. It is uncontradicted that appellee was an unestablished business seeking to operate in a new industry. In such a situation, claimed loss of profits are deemed *as a matter of law* to be too remote and speculative to be recovered. It is equally clear that the damage awarded appellee with respect to the money claimed by the United States was improper. In the first place, it was neither found nor admitted that appellee was in fact liable to the United States—or even that it was reasonably certain that such liability would follow in the future. In the second place, no evidence whatsoever was presented to establish the amount of the loss to the United States. In this regard, the only evidence introduced at trial was a letter of demand written to appellee by the United States. Appellant, moreover, duly objected to this letter as evidence that the United States had in fact been damaged or as evidence of the amount of that damage. Finally, the findings, conclusions and judgment in this connection are contingent, speculative and so inconsistent as to render the district court's judgment wholly erroneous.

Apart from the legal considerations here presented, it is difficult to conceive of any equitable basis for appellee's claim. From the documents contained in appellee's own files, appellant showed that appellee had estimated its maximum expected profit to the United States as \$4,400.00. These documents also showed that appellee in any event could have avoided all of its alleged losses by the expenditure of only \$722.50. Both of these facts were

known to Mr. Mills yet he made no effort to mitigate his supposed damage. Rather he deliberately chose to repudiate his contract with the government and sought to recover from appellant, not the estimated \$4,400.00, but rather over \$13,000.00 as his claimed loss of profit under that contract.

Dated: December 6, 1954.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,

Attorneys for Appellant.

JAMES S. CLINE,

Of Counsel.

Appendix I.

DEERING, MILLIKEN & Co.
Incorporated
Los Angeles Sales Office
111 West Seventh Street
Los Angeles

March 6, 1952

Modern-Aire of Hollywood, Inc.
1112 Sentous
Los Angeles 15, California

Attention: Mr. L. J. Mills

Dear Mr. Mills:

We understand from our conversation today in this office that we have consummated a contract with you for 101,200 yards of 45½" rayon cartridge cloth in the greige as per government specification PXS-1300 and also for 23,900 yards of the same material in 47½" width. These goods are to be furnished to you on terms of net 30 days, f.o.b. our mill, delivery on both items to start the week ending April 25th. We hope to be able to arrange the shipment of these goods to completion one-sixth of each width every two weeks. We understand your contract with the government on which these goods are to be used contains a 90% partial payment clause.

This memo is written with the idea of submitting (it) to the Government Procurement Office.

Very truly yours,

DEERING, MILLIKEN & Co., INC.
/s/ Lee Piersol
Regional Manager

Lee Piersol:ms

Appendix II.

DEERING, MILLIKEN & Co.

Incorporated

Los Angeles Sales Office

111 West Seventh Street

Los Angeles

March 6, 1952

Modern-Aire of Hollywood, Inc.

1112 Sentous

Los Angeles 15, California

Attention: Mr. L. J. Mills

Dear Mr. Mills:

This will confirm our quotation to you of today on 101,-200 yards of 45½" rayon cartridge cloth in the greige as per Specification PXS-1300 at 36⅛¢ per yard and 23,900 yards of the same material in 47½" width in the greige at 37⅜¢ per yard, both on terms of net 30 days, delivery to start in April and spread out to completion.

We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.

Very truly yours,

DEERING, MILLIKEN & Co., INC.

/s/ Lee Piersol

Regional Manager

Lee Piersol:ms

Appendix III.

Section 25 of the Restatement of Contracts and Comment "a." thereof read as follows:

"If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

"Comment:

"a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the usages of business, and indeed all accompanying circumstances."

Appendix IV.

Comment "a." of Section 26 of the Restatement of Contracts reads as follows:

"Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. *On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.*" (Emphasis added.)

No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee.

Appeal From the District Court of the United States for
the Southern District of California, Central Division.
Honorable Ernest A. Tolin, Judge.

APPELLEE'S OPENING BRIEF.

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FILED

JAN 20 1955

PAUL P. O'BRIEN,
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No. 14481
IN THE
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FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee

Appeal From the District Court of the United States for
the Southern District of California, Central Division.

Honorable Ernest A. Tolin, Judge.

APPELLEE'S OPENING BRIEF.

Prefatory Note.

In this brief, in the interest of brevity, reference to the Transcript of Record will be abbreviated "T. R.."

Statement of Jurisdiction.

This is an appeal by Deering-Milliken & Co., Inc., defendant, from a final judgment against it in the United States District Court for the Southern District of California, Central Division, docketed and entered on May 18, 1954. Jurisdiction of the within appeal therefore exists in this Court by virtue of the provisions of Title 28, *United States Code*, Sections 1291 and 2107.

Jurisdiction of the within cause existed in the trial court by virtue of Title 28, *United States Code*, Section 1332(a)(1). Plaintiff-appellee is a California corporation and defendant-appellant is a New York corporation and the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs. These facts are alleged by plaintiff in paragraph I of its complaint [T. R. I, pp. 3-4], and are found to be true by the trial court in paragraph I of its Findings of Fact. [T. R. I, p. 25.]

Statement or Abstract of the Case.

Statement of Facts.

These are the elicited facts:

That on or about the 14th day of March, 1952, a written contract was made, executed and delivered by and between Appellee and the United States of America, the latter by and through the Department of the Army, under and pursuant to the terms of which Appellee agreed to manufacture and deliver a certain ordnance item, described in that contract as "LINER, (INNER), ASSEMBLY, for case, Cartridge, 105 mm, M32." The contract authorized the Appellee to produce a maximum total of 468,384 of said items, for which Appellee would be entitled to receive the sum of \$70,725.98. The unit price for each of said items was fixed in the contract at \$0.151. The written contract further provided that the liners were to be manufactured of rayon cloth and in accordance with certain military specification designated by the Department of the Army as PA-PD-29. These specifications set forth the specific standards of quality and manufacture which the cloth used in the manufacture of the liner would be required to meet.

Preliminary negotiations which eventually resulted in the execution of the aforesaid written contract with the United States of America had commenced on or about December 18, 1951.

Sometime during the month of January, 1952, and while the aforesaid preliminary negotiations were being carried on between the Appellee and the United States of America, Appellee and Appellant herein likewise commenced negotiations looking to the making of a contract whereby the Appellant would supply the rayon cloth needed by the Appellee for the manufacture of these liners. As a result of a series of conversations, and letters, a contract was made and executed by and between the Appellee and Appellant, whereby the Appellant would deliver to Appellee 126,000 yards of rayon cartridge cloth for the purchase price of $36\frac{1}{8}\text{¢}$ per yard, or a total purchase price of \$45,517.50. This contract provided that the aforesaid rayon cartridge cloth would be manufactured pursuant to the aforesaid military specifications, PA-PD-29, and that delivery of said cloth would start in April, 1952, and be "spread out to completion."

That throughout the negotiations had by and between the Appellee and Appellant, the latter, at all times, knew that the cloth was to be manufactured in accordance with the aforesaid military specifications; that the cloth was being purchased by the Appellee, so that it, in turn, could manufacture the liners under and pursuant to the terms of the contract which it negotiated with the United States of America, on or about the 14th day of March, 1952, as aforesaid.

That the Appellee was fully familiar with military specifications and that it had been party to contracts in-

volving the procurement of material for the United States Government, Department of the Army.

That approximately one (1) week after the execution of the contract by and between the Appellee and the United States of America, and on or about March 21, 1952, the New York office of the Appellant, by and through its representative, Mr. Lovett, sent a teletype message to its Los Angeles office, the regional manager of which was one Mr. Lee Piersol, as follows:

“MR. LOVETT CLG, MR. PIERSOL

RE MODERN AIRE SPEC CALLS FOR MIN POROSITY OF 35 CUBIC FT PER MIN PER SQ FOOT AND A TEST JUST COMPLETED ON OUR GREIGE CLOTH SHOWED 8.5 POROSITY WHICH DOES NOT MEET GOVT SPEC IN ORDER TO CORRECT THIS WOULD REQUIRE TOO LONG A TIME AND WE BE UNABLE TO MEET DELIVERY DO EVERYTHING POSSIBLE TO HAVE CUST ACCEPT.”

Soon after receipt of the foregoing teletype message, a representative of the United States of America, Department of the Army, Los Angeles Ordnance District in Pasadena, California, called the Appellant by telephone at its New York office and there spoke with Appellant's vice-president, one J. C. Harris, and inquired of the said Mr. Harris as to the apparent inability or unwillingness of the Appellant to perform its contract with Appellee. The said Mr. Harris thereupon advised the representative of the United States Army that in order to meet the aforesaid specification PA-PD-29, it would be necessary for the Appellant to do further

processing upon said cloth, that it would cost Appellant approximately 3¢ per yard to complete such processing, and that accordingly, Appellant was no longer interested in pursuing the matter. The United States of America, by and through its authorized agencies, thereupon proceeded to and did procure the aforesaid liner from a supplier other than the Appellee, but in order to procure the same was required to and did pay the sum of \$4,100.66 in excess of the price fixed in the contract by and between the Appellee and the United States of America.

Appellee's cost of production of the liners would have been \$66,304.38; the contract price receivable by it as aforesaid was \$70,725.98. Appellee would thus have realized a profit of \$4,421.60.

As a result of Appellant's breach of contract, and the Appellee's resulting inability to perform its contract with the United States of America, as aforesaid, the United States of America served, or caused to be served, upon the Appellee, on or about the 2nd day of June, 1952, a Notice of Termination for Default in connection with the aforesaid contract dated March 14, 1952. Thereafter, to wit, on or about July 8, 1952, and pursuant to the terms and provisions of the aforesaid Notice of Termination for Default, the United States of America, Los Angeles Ordnance District, made demand upon the Appellee for the payment of the aforesaid sum of \$4,100.66.

Questions Involved.

The questions before this Court are the following:

1. Is the judgment of the trial court correct?
2. Are the Findings of Fact supported by the oral and documentary evidence in the record?

To properly determine these questions requires a consideration of the following issues:

- A. Was there a binding contract between Appellant and Appellee?
- B. Is not the Appellant estopped to deny the existence of a contract with the Appellee?
- C. Was the contract between the Appellant and the Appellee breached by the Appellee?
- D. Did the Court apply the proper measure of damages?

These questions, initially made issues by the pleadings, are now raised by the contentions of the Appellant that the evidence adduced at the trial does not support the Findings and Judgment made and entered herein, and that the Honorable District Court did not follow or properly apply the law.

Counsel must at this point state that that portion of Appellant's "Statement of the Case" appearing at page 3 of Appellant's Opening Brief relative to Appellant being a manufacturer of *finished* textile products cannot be permitted to stand unchallenged or uncontroverted. Such a statement is not supported in the record, and odd it

is that Appellant does not cite a transcript reference to support its statement. The reason for such omission is apparent. The record relative to the background and activities of the Appellee is devoid of the phrase "finished textile products." [T. R. p. 117.] Appellant's indicated anxiety in emphasizing the word "finished", and the reason therefor, will become increasingly apparent as its brief is read; the nonchalant but striking manner in which it gives credence and strength to the thought of Shakespeare that "things are not really as they are" confesses the weakness of its position.

Again, and this is most significant, Plaintiff's Exhibit 11—Appellant's confession of its breach of contract—has received new treatment and a re-writing by the Appellant. A less than analytical reading of page 17 of its brief would lead one to the conclusion that Exhibit 11, the wire from one of Appellant's officers to another, contained the phrase "finished cloth." But of course the word "finished" does not appear therein.

These are the facts.

ARGUMENT AND POINTS OF LAW.

I.

The Evidence in Support of the Findings and Judgment of the Trial Court Is Sufficient, Substantial and Credible.

Appellant, anxious to persuade this Honorable Court to substitute its interpretation of the evidence for that of the trial court, has devoted all, or substantially all, of its brief to arguing the evidence, pointing out what it considers to be inconsistencies in the testimony of Appellee's witnesses, and naively presenting only the testimony of its witnesses, when in fact there is a sharp conflict in the testimony.

In its seventy-nine page effort, however, Appellant has belied its own position and given truth to that of the Appellee. Witness page 9 of Appellant's brief, wherein appears the following in part:

"Appellant further believed . . . "; and

"On the other hand, Mr. Mills (Appellee) claims . . ."

There follow references to the transcript of the testimony. What clearer acknowledgment of a conflict in the evidence could there be?

Again, observe page 11 of Appellant's brief, where the conflict in the testimony of witnesses is meticulously delineated; there follows the interpretation placed thereon by the Appellant. Unfortunately for it, however, this interpretation is not in accord with that of the Honorable Trial Court.

Appellant has completely disregarded the basic principle of law, that on appeal every intendment and presumption must be indulged in favor of the trial court's

judgment. It appears hardly necessary to state the general and long accepted rule of law with respect to the right of an Appellate Court to review conflicting evidence, which rule is as follows:

“The Court, in reviewing conflicting evidence, will presume that the evidence in support of the verdict or findings is true, and will construe it and resolve every substantial conflict as favorably as possible in support thereof.”

4 *Cal. Jur.* 2d, sec. 575, p. 449;

Estate of Chamberlain, 44 *Cal. App.* 2d 193, 198.

In the case of *De La Motte v. Rucker*, 55 *Cal. App.* 2d 226, 229-230, Justice Moore reiterated this well established principle of law in the following language:

“In viewing the evidence in support of a finding, it is incumbent upon the appellate Court to accept all evidence and the inferences arising therefrom which tend to establish the correctness of the finding; also, it is required to consider the evidence in its most favorable aspect toward the prevailing party; it must accept the evidence in support of the finding as true and resolve every substantial conflict as favorable to the decision of the court (2 *Cal. Jur.*, sec. 515, p. 879) whatever may be the opinion of appellate court as to the weight of evidence. Rules followed for the guidance of juries do not control reviewing courts. If there is material credible evidence in support of the findings of the trial court, the appellate court is without power to disturb them. (*Albaugh v. Mt. Shasta Power Corp.*, 9 *Cal. 2d* 751, 773 (73 *P. 2d* 217).) All conflicts here must be resolved in favor of respondent and all legitimate, reasonable inferences must be drawn in support of the findings below. The power of the appellate court

'begins and ends with a determination as to whether there is any substantial evidence' in support of the judgment. (*Crawford v. Southern Pac. Co.*, 3 Cal. 2d 427, 429 (45 P. 2d 183).) Judgment of the trial court will not be upset because a preponderance is on the side of the losing party, but only where there is a total absence of competent evidence. (*Shapiro v. Shapiro*, 127 Cal. App. 20 (14 P. 2d 1058).) The trial judge has the sole right to believe or reject the testimony of witnesses. Although contrary findings might have been upheld, the judgment for that reason will not be disturbed." (Cases cited.)

Appellant attempts to bolster its case by pointing out some minor contradictions in the Appellee's testimony. This, in and of itself, is not sufficient to set aside the trial court's decision. It must be assumed that the trial court was well aware of the contradictions and did nevertheless determine what facts were true and who should be believed. The appellate court is bound by this determination of the trial court.

"When a verdict or vital finding is based on the testimony of one witness, and this testimony is contradictory, it will be presumed that the trier of fact found some reasonable or legal excuse for the inconsistency and had justification for concluding that upon the whole the witness told the truth."

4 Cal. Jur. 2d, sec. 575, pp. 448-449;

Accord: *Firth v. Southern Pacific Co.*, 44 Cal. App. 511;

Biurrun v. Elizalde, 75 Cal. App. 44.

Certain additional cardinal tenets must be here reiterated:

1. The trial court's Findings will not be disturbed if they are supported by any substantial and credible evidence.

Mitchell v. Holmes, 9 Cal. App. 2d 461, 462;
2 Cal. Jur. 870, 912, 913.

2. The trial court is exclusive judge of all questions of credibility of witnesses, and of the weight of the evidence.

Field v. Mollison, 50 Cal. App. 2d 585, 591;
Accord: *Estate of Rule*, 25 Cal. 2d 1.

Being mindful thereof, Appellee will, during that portion of this brief which follows immediately hereafter, refer almost exclusively to the *Appellant's own evidence* in support of the propriety and correctness of the Findings and Judgment, for such evidence is of itself ample to prove Appellee's case. But not to be disregarded is the evidence of the Appellee, which although in some respects controverted by the Appellant, was nevertheless believed by the trial court.

Thus, if the evidence is sufficient, as Appellee contends, to support the Findings and Judgment of the trial court, all other issues raised and contentions made by the Appellant must fail. Appellee respectfully submits, however, that the law, as well as the facts, supports the position of the Appellee and the judgment of the Honorable Trial Court.

II.

Appellant Deering-Milliken Is Estopped to Deny the Existence of a Valid, Binding and Enforceable Contract Between It and the Appellee in This Action.

A. The law in California is codified in Section 1962 (3), Code of Civil Procedure, as follows:

“Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”

See: *Williston on Contracts*, Vol. 5, Sec. 1508, Rev. Ed.

Blackstone has suggested the definition or rationale of the doctrine of estoppel to be a bar

“by which a man is precluded from alleging or denying a fact, in consequence of his own previous action, inaction, allegation or denial which has led another to so conduct himself that, if the truth were established, that other would be damaged.”

3 Black. Com. 308;

See: *Davenport v. Stratton*, 24 Cal. 2d 232, 243.

And the doctrine is applicable whether the estoppel rests in judgment, deed, contract, or *in pais*.

Allen v. Hance, 161 Cal. 189, 196.

B. The proper application of the doctrine of estoppel depends upon the existence of these four essentials:

(a) The party to be estopped must be apprised of the facts;

(b) He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;

(c) The other party must be ignorant of the true state of facts; and

(d) He must rely upon the conduct to his injury.

10 *Cal. Jur.* 626, 627, Sec. 14;

Franke v. Claus, 121 *Cal. App. 2d* 777, 786-787.

It is submitted that each of the above requisites is amply satisfied in the record before this Court:

(1) At all times from the beginning of the negotiations between the Appellee and Appellant, and continuing thereafter—that is, from December 21, 1951 and thereafter, Appellant knew what the required military specifications were, and that the greige goods would not meet such specifications. Mr. Charles Lovett, the Appellant's employee in charge of this phase of Appellant's activities, so testified on direct examination by Mr. Lydick [T. R. pp. 625, 627] and yet Appellant did nothing to advise the Appellee with respect to this fact prior to the execution of the letters of confirmation dated March 6, 1952. [Pltf. Exs. 6, 7; T. R. pp. 637, 651.]

(2) Clearly Exhibit 6, signed by Mr. Lee Piersol, the Appellant's Regional Manager, was intended to induce action and conduct on the part of the Appellee and the United States Government, in reliance upon said letter. Such letter so states.

(3) At no time prior to March 6, 1952, did the Appellee know that the goods would not meet the specifica-

tions. Neither Messrs. Piersol nor Lovett did anything to apprise the Appellee of the true facts. [T. R. pp. 431, 637, 651.]

(4) That the Appellee relied on the conduct and actions of the Appellant as documented by it in Plaintiff's Exhibits 6 and 7, cannot be honestly doubted. Mr. Piersol testified that he did not intend to deceive the United States Government in the writing of Plaintiff's Exhibits 6 and 7. [T. R. pp. 510-512.] Mr. Piersol is thus entitled to the presumption, in this regard at least, that he was telling the truth. (*Code Civ. Proc.*, Sec. 1847.) So it must necessarily follow that he truthfully recited in Plaintiff's Exhibit 6 that Appellee and Appellant had consummated a contract and accordingly truthfully warranted or represented to the Appellee *and the United States Government* that they could proceed with the formalizing of their contract. [Pltf. Ex. 12.]

It is to be observed that all of these elements are established and found to be existing on the basis of the testimony of *Appellant's* witnesses. No resort need be had to any of the testimony adduced on behalf of the Appellee, although the testimony of Leonard Mills, both on direct and cross-examination, corroborates that of the Appellant's witnesses. [T. R. pp. 88-89, 93-94, 222, 228-229, 334.]

C. Appellee respectfully submits that its Complaint sufficiently pleads all of the requisite elements of an estoppel,

See: *Meadows v. Hampton Co.*, 55 Cal. App. 2d 634, 636, although the rule in California is that in a *plaintiff's* pleadings, as distinguished from those matters of *defense*

required to be affirmatively set out, estoppel need not be pleaded.

Corp. of America v. Harris, 5 Cal. App. 2d 452, 462;

McCreery v. Charlton, 185 Cal. 37.

Conceding that Appellee's Complaint is not an exemplar of a well-drawn complaint in estoppel, the record in the case at bar is devoid of a valid objection by the Appellant to the introduction of testimony by the Appellee in support of liability predicated upon the theory of estoppel. Failure so to object is a waiver of such defects in a complaint as might be found to exist.

Foster v. Fisher, 44 Cal. App. 2d 33, 37;

Woody v. Security Bank, 137 Cal. App. 29;

See: *Franke v. Claus*, *supra*, 121 Cal. App. 2d 786.

And the existence or non-existence of estoppel is an issue of fact for the determination of the trial court.

10 Cal. Jur., Sec. 31, p. 656;

Parke v. Franciscus, 194 Cal. 284;

Gump v. Gump, 42 Cal. App. 2d 64, 69.

It is respectfully submitted that the proof of estoppel is clear, convincing and without meritorious contradiction or substantial conflict.

D. Just as one may be estopped to falsify an oral or written representation which he has asserted to be true, so may one be estopped to assert legal defenses, such as the Statute of Frauds.

10 Cal. Jur. p. 644, Sec. 24;

Seymour v. Oelrichs, 156 Cal. 782, 794-795.

In the latter case, which is landmark law in this jurisdiction, the Court expressed this rule in the following language which has been repeatedly adopted and quoted in cases thereafter decided:

“The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle ‘thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.’ (2 Pomeroy’s Equity Jurisprudence, sec. 921.) It was said in *Glass v. Hulbert*, 102 Mass. 24, 35 (3 Am. Rep. 418): ‘*The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.*’ ” (Emphasis added.)

Accord: *Williston on Contracts*, Rev. Ed., Vol. 2, Sec. 533A;

Fleming v. Dolfin, 214 Cal. 269;

Wilson v. Bailey, 8 Cal. 2d 416, 422.

III.

A Valid, Binding and Enforceable Contract Was Made, Executed and Entered Into on March 6, 1952, Said Contract Consisting of the Two Letters Dated on Said Date and Being Plaintiff's Exhibits 6 and 7 in Evidence.

A. Appellee earnestly and sincerely urges that independent of a right of recovery based upon the doctrine of estoppel, Appellee is entitled to recover upon the basis of the existence of a binding contract to buy and sell the greige goods here involved. This agreement is to be found in Plaintiff's Exhibits 6 and 7, the two letters dated March 6, 1952.

These letters contain all of the material and essential factors and items necessary to the formation of a contract to sell, namely:

- (a) The buyer;
- (b) The seller;
- (c) The price to be paid;
- (d) The time and manner of payment; and
- (e) The property to be transferred, describing it so it may be identified.

King v. Stanley, 32 Cal. 2d 584, 589;

O'Donnell v. Lutter, 68 Cal. App. 2d 376, 381;

Grafton v. Cummings, 99 U. S. 100, 106.

The law with respect to the manner in which a contract to sell may be made or formed is to be found in

Section 1723, Civil Code of California, reading as follows:

“Subject to the provisions of this act and of any statute in that behalf, a contract to sell may be made in writing (either with or without sale), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred by the conduct of the parties.”

It is submitted that this Court will not give sympathetic ear to any contention that an agreement of sale and purchase can be evidenced only by a formal contract drawn with technical exactness. A memorandum of the agreement is sufficient and this may be found in one paper or in several documents, *or in a letter from the vendor to the purchaser which is accepted and acted upon by the latter.*

De Rutte v. Muldrow, 16 Cal. 505;

See: *King v. Stanley*, *supra*, 32 Cal. 2d 588.

Wherein do Plaintiff's Exhibits 6 and 7 fail to meet the tests prescribed by these authorities?

Is it to be contended by the Appellant that these letters are insufficient memoranda to satisfy the Statute of Frauds (Sec. 1624a Civ. Code) as it meekly suggested during the trial of this action? [T. R. p. 253.] If so, wherein do these exhibits not constitute a “note or memorandum in writing of the contract or sale . . . signed by the party to be charged or his agent in that behalf?”

See: *Murphy v. Munsen*, 95 Cal. App. 2d 306, wherein in a case in many respects analogous to the situation at bar, a judgment by the trial court in favor of the party defendant pleading the defense of the Statute of Frauds

was reversed with directions to enter Judgment in favor of the plaintiff.

Is it to be seriously asserted by the Appellant that Mr. Piersol, the man who signed every document in evidence bearing his signature over the designation "Regional Manager" and who, on several occasions to be hereinafter designated, contradicted his own testimony previously given on the question of agency and authority, was not, in the language of Section 1624a of the Civil Code, Appellant's "agent in that behalf?"

Is it to be contended by the Appellant that Mr. Mills had not, in the language of Section 1624a (3) of the Civil Code expressed "by words and conduct his assent to becoming the owner of those specific goods" and thus rendered Appellee liable in damages if delivery thereof had been proffered by the defendant?

The testimony of Mr. McEwen called on behalf of the Appellant certainly indicates that the Appellant considered the Appellee to have been bound to a contract and that a deposit was thus required so that in the event that the Appellee did not fulfill the contract, it might be held liable out of that deposit for such loss as the Appellant might sustain. [T. R. p. 661.]

Even if these contentions, or any of them, be accepted by the Court, is not the defendant estopped to rely on the Statute of Frauds?

See: *Seymour v. Oerlichs*, *supra*, 156 Cal. 782.

Is it to be contended by the Appellant, and with serious countenance, that Plaintiff's Exhibits 6 and 7 were but preliminary negotiations to be treated only as a suggested outline of a contract to be later drawn? If so,

why use the word "contract?" [Ex. 7.] If so, why acknowledge that it [Ex. 6] was intended to be submitted to the government procurement office? If so, why not state that a "sales note" or other formally drawn contract shall constitute the only agreement of the parties? If so, why not state that these letters merely constitute an offer?

King v. Stanley, supra, 32 Cal. 2d 584, 591;

O'Donnell v. Lutter, supra, 68 Cal. App. 2d 376, 383.

Or is Appellant to contend that there was some fatal uncertainty in these letters because thereafter one width was agreed upon instead of two. [T. R. pp. 256, 519.] Although there is testimony elicited from Appellant's Mr. Piersol under *direct examination* that on or about February 21, 1952—*long before* Plaintiff's Exhibits 6 and 7 were written—the possibility of a single width was discussed. [T. R. p. 470] yet for the purpose of argument, it will be assumed that the single width was not finally agreed upon until after March 6, 1952. If this be a contention upon which Appellant elects to rely, its merit cannot long stand in the face of settled authority.

Such a contention rests, of course, upon the theory that by virtue of such change from two widths of cloth to one, the parties indicated that on March 6, 1952, the subject matter of the contract was uncertain. If such be the theory, it finds no support in the law of California. In fact, if the letters of March 6, 1952, Plaintiff's Exhibits 6 and 7, had themselves provided that Appellee had the option to later change from two widths to one width, such provision would not have rendered them invalid as a binding contract.

B. In nearly every instance, an agreement sued upon that has given the buyer an election or opportunity to select the goods specified in the contract of sale from a general grouping or classification has been sustained and considered by the courts to be sufficiently definite and mutual as to be enforceable.

Windsor Manufacturing Co. v. S. Makransky & Sons, 322 Pa. 466, 186 Atl. 84; 105 A. L. R. 1096.

In the cited case, two writings had been exchanged between the parties. One was dated August 29, 1933, entitled a "Purchase Memorandum," while the other, under date of August 21, 1933, was termed an "Acknowledgment of Order." These documents were alleged to constitute a valid and definitive contract. They contained, among other things, a provision affording to the buyer an election to make selection of the style of fabrics from the samples to be submitted approximately six weeks after the date of these documents. The Court said (105 A. L. R. 1099) the following:

"The total quantity of goods was settled, and the price per yard fixed; any differential in price being ascertainable at the time of the submission of samples. . . . It is clear to us and the principle is well sustained by authority, that existence of an election within prescribed limits exercisable by one party to a contract does not vitiate a contract for uncertainty."

California is in accord with the rule expressed in the cited case.

In *Hylton Flour Mills, Inc. v. Bowen*, 128 Cal. App. 711, a written agreement provided among other things

that the buyer should be permitted a choice of brands of flour. The seller contended that this made the agreement invalid for uncertainty. The Court said, at page 714, the following:

“The above quoted language of the contract states that plaintiff ‘sells’ and defendant ‘buys.’ The quantity is definite. The time within which shipment is to be made is fixed. The terms of payment are set forth. It is true that the buyer is permitted a choice of five different brands. This circumstance, however, does not alter the fact that he has specifically agreed to purchase a definite quantity of flour within a certain fixed period of time. The discretion permitted the purchaser as to the quality or brand of flour to be selected by him did not introduce such an element of uncertainty as would invalidate the contract. (*Mebius & Drescher Co. v. Mills*, 150 Cal. 229 (88 Pac. 917).”

Accord: *Mebius & Co. v. Mills*, 150 Cal. 229;

McIllmoil v. Frawley Motors, 190 Cal. 546.

In the *McIllmoil* case, the Court held that the subject matter of the contract and the price to be paid therefor, were not matters left for future agreement and that the mere fact that the buyer might thereafter select the model of the car he wanted, did not make the contract uncertain. And further that the selection by the plaintiff of the car desired determined the price and made the contract definite in that respect also.

In the *Mebius* case, the Court said that even though the particular quality of the salt to be selected between several varieties carried by the dealer was not stipulated in the contract, the contract was still valid and not uncertain. The Court held that the maximum quantity de-

liverable was fixed and that merely because a certain discretion as to quality was allowed, this did not invalidate the contract for uncertainty. The Court pointed out that such uncertainty as may have existed was at once relieved when the choice was exercised and so held that the matter falls within the rule that "that is certain which can be made certain." (See: Sec. 3538, Civ. Code of California.)

A fortiori, under these authorities, an *agreed* change from two widths to one should cause less doubt.

(1) The law does not favor but leans against the destruction of contracts because of uncertainty; it will, if feasible, so construe agreements as to carry into effect the reasonable intention of the parties if it can be ascertained.

McIllmoil v. Frawley Motor Co., *supra*, 190 Cal. 546, at 549;

Roy v. Salisbury, 21 Cal. 2d 176, 184;

Mancuso v. Krackov, 110 Cal. App. 2d 113, 115-116.

The language of the last cited case is particularly appropriate. There the Court said, at pages 115-116, as follows:

"While it is essential that the mutual assent of the parties to the terms of the contract must be sufficiently definite to enable the court to ascertain what they are (citation), nevertheless, it is not necessary that each term be spelled out in minute detail. It is only that the essentials of the contract must be agreed upon and *be ascertainable*. (Citation.) The law does not favor the destruction of contracts on the ground of indefiniteness, and if it be feasible,

the court will so construe the agreement as to carry into effect the reasonable intentions of the parties if they can be ascertained. (Citation.) Furthermore, it is a well established principle of law that that which can be made certain is certain. (Citations.)” (Emphasis added.)

It is respectfully submitted that all of the requisite elements of a contract are present and are delineated with sufficient certainty so as to constitute the letters [Pltf. Exs. 6 and 7] a valid, binding and enforceable contract.

See: 12 *Cal. Jur.* 2d, Sec. 109, p. 313.

(2) It is, of course, to be observed that this action was not and is not one for specific performance. The rule is that the degree of exactness necessary to entitle one to a decree for specific performance need not exist in order to entitle one to recover damages for breach of such contract.

Stanton v. Singleton, 126 Cal. 657.

(3) The law of California requires that a contract receive such an interpretation as will make it definite and capable of being carried into effect, if it can be done without violating the intentions of the parties.

Sec. 1643, Civ. Code of California.

Such rule is further to be found in the Restatement of Contracts, Section 32, where as Comment C is to be found the following:

“Offers which are originally too indefinite may later acquire precision and become valid offers by

the subsequent words and acts of the offeror or his assent to words or acts of the offeree.”

Marin Water and Power Co. v. Sausalito, 168 Cal. 587.

Appellee earnestly contends that the determination made on or about March 14, 1952, to supply the goods in one width instead of two, was a valid and operative modification of the contract expressed in the letters of March 6, 1952 [Pltf. Exs. 6 and 7] and hence removed whatever uncertainty might have been theretofore existent. Such determination made prior to the execution of the memorandum of order [Pltf. Ex. 8; T. R. p. 519] was accepted and acted upon by the Appellee and Appellant by virtue of Appellant's executing said Exhibit 8 and Appellee executing its contract with the government. These acts, in the language of the Restatement of Contracts above cited, constitute “subsequent words or acts of the offeror” and “assent to words or acts of the offeree.”

These acts serve a second and thus dual purpose, for they also bring the parties within the rule that a written contract may be modified by an oral agreement which has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it.

12 *Am. Jur.* p. 1007, Sec. 428; p. 987, Sec. 407;

12 *Cal. Jur.* 2d 402, Sec. 184;

Wilson v. Bailey, *supra*, 8 Cal. 2d 416.

Apropos of the contract and the certainty thereof, counsel is constrained to invite the Court's attention to the following evidence, all of which stands without challenge in the record:

(a) In the course of the long and meticulous examination of Leonard Mills, extending from page 111 to page 328 of the Transcript of Record, and resuming again at page 567 and continuing to page 616, counsel for the Appellant elicited the fact that all of the terms which were finally formalized in the letters of March 6, 1952 [Pltf. Exs. 6 and 7] had been discussed.

(b) In the examination of Mr. Piersol, under Rule 43b of Federal Rules of Civil Procedure, it was established that all of the terms, including the fact that at all times in using the phrase "in the greige" Mr. Piersol meant "as the goods came off the loom," were discussed prior to the writing of the letters of March 6th. As Mr. Piersol states [T. R. p. 358]:

"I believe that those questions (terms, shipment, delivery) were discussed to some extent almost every time we discussed yardage."

Terms had been discussed even prior to January 16, 1952. [T. R. p. 363.]

As to the matter of the meaning of "in the greige," Mr. Piersol acknowledged "greige goods means that goods as they come off the loom." [T. R. p. 348.]

(c) Counsel suggests that the comment of Appellant's counsel that the real basis for this misunderstanding

grows out of the entire lack of understanding of Mr. Mills about an industry he knows nothing about, is interesting. [T. R. p. 219.] Counsel for the Appellee would venture the thought that the only misunderstanding that ever arose or existed pertained to the meaning of the phrase "in the greige." Appellant's counsel was likewise considerably concerned with Mr. Mills' understanding of that term, for on no less than thirteen separate occasions during the cross-examination of Mr. Mills, Mr. Lydick asked questions to elicit from Mr. Mills the latter's definition of the phrase "in the greige," and on each of these occasions, he said: "It means as it comes off the loom." [T. R. pp. 165, 166, 168, 169, 170, 172, 176.] In addition to Mr. Lydick's inquiry, the Court inquired of Mr. Mills as to the latter's understanding of the phrase. The Court's inquiry appears at [T. R. pp. 172, 173]. This understanding and interpretation of the phrase is in complete accord with the understanding and definition of the phrase given by every witness called on behalf of the Appellant, and who was questioned in that matter. Mr. Piersol so testified [T. R. p. 348]; Mr. Charles Lovett so testified [T. R. p. 621]; Mr. Frank B. McNeil so testified [T. R. p. 688]. Mr. Piersol acknowledged that throughout the whole negotiations, the parties talked of "greige goods" [T. R. p. 522], and that Mr. Mills never told him that he (Mr. Mills) desired finished goods. [T. R. p. 546.] Certainly if Mr. Mills knew nothing else about the textile industry, he knew the precise and correct definition and meaning of the very heart and subject

matter of the contract, that is, “greige goods.” So if there was any misunderstanding, it is suggested that it was one to which the Appellee was not a party. Certainly there was no misunderstanding as to all of the terms of the contract. All of the matters were clearly understood, determined and acknowledged prior to the execution of Plaintiff’s Exhibits 6 and 7 on March 6, 1952. Counsel for the appellee, although perhaps somewhat inartistically, finally managed to have Mr. Piersol explain the chronology of certain events and documents prior to March 6, 1952. [T. R. pp. 386, 393-394.] These documents are Plaintiff’s Exhibits 22, 23, 24, 25, 26, 27 and 28. The significant thing, and such significance cannot be underestimated, is that Exhibit 22 (a teletype message from Mr. Piersol to Mr. Lovett) contains the precise terms later to be found in Plaintiff’s Exhibits 6 and 7. Exhibits 23, 24, 25 and 26, all sent during the period March 5 and March 6, 1952, clarify whatever misunderstanding Appellant’s New York and Los Angeles offices might have had with the *eventual result that the acceptance of the order precisely as proposed and set forth in Plaintiff’s Exhibit 22 was given.*

And it was only after receipt of all of these exhibits [Exs. 22-26, incl.] that Mr. Piersol wrote the letters of March 6, 1952, Plaintiff’s Exhibits 6 and 7. [T. R. p. 394.] Under what stretch of the imagination could one argue that there was any uncertainty with respect to the understanding of the parties at the time that Plaintiff’s Exhibits 6 and 7 were being dictated?

IV.

Appellee Was Not Under a Duty to Mitigate or Minimize Its Damages, for Such Duty Does Not Require an Aggrieved Party to Assume the Burden Which the Adverse Wrongdoer Has Violated, or to Incur Relatively Large Expense on That Account.

8 *Cal. Jur.* 782, Sec. 43;

Dutra v. Cabral, 80 Cal. App. 2d 114, 122;

Chambers v. Belmore Land & Water Co., 33 Cal. App. 78;

Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 491;

Ash v. Soo Sing Lung, 177 Cal. 356;

See: *Schultz v. Town of Lakeport*, 5 Cal. 2d 377, 384.

A. The law is well established that in an action for damages, the plaintiff has the burden of establishing the damages which result from the defendant's tortious act or his breach of contract, *but that insofar as it may be contended that the damages might and should have been minimized by taking steps to reduce the resulting damages or prevent the accrual of damages, the burden of proof rests upon the defendant.*

15 *Am. Jur.* p. 770, Sec. 371;

Dutra v. Cabral, *supra*, 80 Cal. App. 2d 114, at 121;

Downs v. Sherry, 90 Cal. App. 2d 1, 6;

Steelduct Co. v. Henger-Seltzer, 26 Cal. 2d 634, 654;

See: *Ozmo Oil Co. v. Cotton & Co.* (C. C. A. 9th), 278 Fed. 722.

It is submitted that the Appellant has neither assumed, carried, nor discharged this burden. In all of the Appellant's evidence, both oral and documentary, there is but one attempted showing with respect to a price at which the Appellee might have obtained goods elsewhere [Deft. Ex. Z], and yet an examination of this exhibit immediately reveals that it cannot furnish a fair basis for determining the extent to which damages might have been minimized. Primarily, the widths of cloth therein referred to—30½ inch and 36½ inch—do not correspond with the widths for which the Appellee and Appellant had negotiated and contracted—45½ inch and 47½ inch. Secondly, Exhibit Z is concerned with finished cloth and not with greige goods, and the testimony is patently clear that at no time prior to March 21, 1952, did Mr. Mills and Mr. Piersol tell each other that it was finished goods that was desired by Mr. Mills, or that it was finished goods that Deering-Milliken intended to furnish. [T. R. pp. 424, 431, 537, 545, 546.]

B. The only evidence relative to the cost of procuring similar goods elsewhere is to be found in the testimony adduced on behalf of the plaintiff. Mr. Mills testified that he had ascertained from the representative of Paul Whitin Co., another supplier of such goods, that the additional cost for *just the first shipment of those goods—a total of 20,000 yards*—would be \$1,600.00 and that he so advised Mr. Piersol. [T. R. pp. 103, 283.] Further, Mr. Mills testified that he had ascertained that the goods *in toto* would cost approximately \$10,000.00 additional,

and that there was no assurance as to the time in which the plaintiff would be able to secure the goods. [T. R. pp. 104, 292.] His testimony in this respect is borne out by the contents of Plaintiff's Exhibits 15 and 16. An arithmetical computation will show that the added cost of the goods, if procured from J. P. Stevens & Co., Inc. [Ex. 15] would be approximately \$9,057.00; if procured from Iselin-Jefferson Company, Inc. [Ex. 16] such added cost would be approximately \$7,225.00. And aside from the item of added cost, delivery of the goods could not be made as required by the schedule set therefor by the agency of the United States Government therein involved.

A proper application of the law to this evidence compels the conclusion that a duty to minimize or mitigate damages would not require such expenditures by the Appellee.

Dutra v. Cabral, supra, 80 Cal. App. 2d 114, at p. 122, wherein the Court said as follows:

"It is true that it is the duty of an aggrieved party to exercise reasonable care to minimize anticipated damages growing out of the breach of a contract. *But, ordinarily, it is not the duty of a party to a contract to assume the burden which the adverse wrongdoer has violated, nor to incur relatively large expenses on that account.* (Citations.) Where the cost of procuring water from a source other than that which is contemplated by the contract is relatively large as compared with the damages sustained, the California cases have held that the failure to thus minimize damages will not warrant the reversal of a judgment in favor of the aggrieved party." (Emphasis added.)

In the *Dutra* case, plaintiff sued for breach of an oral crop-lease, charging that the defendant's failure to supply a well and to pump water for necessary irrigation of the crop caused crop failure. The Court found that plaintiff's total damages were \$3,115.60. It was held that the plaintiff would have had to make an unreasonable outlay of cost, time and labor in procuring water and hence the judgment in favor of the plaintiff would not be reversed for failure to minimize damages under such circumstances.

Accord: *Chambers v. Belmore Land & Water Co.*, 33 Cal. App. 78, wherein the Court found that if the defendant, the lessor, had constructed a dam which the lease required of him to do, plaintiff, the lessee, would have realized crops of the value of \$5,078.55. The Court further found that plaintiff would have been required to expend approximately \$2,000.00 to build the dam and it was concluded that the rule requiring mitigation of damages did not require such a large expenditure, and hence was inapplicable in the case.

See: *Coulter v. Sausalito Bay Water Co.*, *supra*, 122 Cal. App. 480, at 491.

It is respectfully submitted that to have required Appellee to spend an amount equal to its entire profit would impose an unreasonable requirement and duty.

Valencia v. Shell Oil Co., 23 Cal. 2d 840, 846, wherein the Court said as follows:

"The duty to minimize damages does not require an injured person to do what is unreasonable or

impracticable and, consequently, when expenditures are necessary for minimization of damages *the duty does not run to a person who is financially unable to make such expenditures.* (Citing cases.)” (Emphasis added.)

Query: Under the rule above stated, as to the burden of proof in matters of litigation, was not the Appellant required to show Appellee’s financial ability to pay these added costs?

C. Appellant has contended that the Appellee could have reduced his loss of profit by having the goods finished at a cost of three cents (3¢) per yard. [T. R. pp. 316, 485, 562.]

Aside from an additional delay of two weeks which would result from applying a finishing process to the goods [T. R. p. 485] and the consequence therefrom that delivery in accordance with the schedule fixed by the agency of the United States Government would be rendered impossible [T. R. p. 313], it is submitted that under the authorities cited, it was not the duty of the Appellee to assume the burden which the defendant had violated, that is, to furnish goods which, among other things, would meet the porosity requirement of Specification PA-PD-29.

Dutra v. Cabral, supra, 80 Cal. App. 2d 122;
8 Cal. Jur., *supra*, at p. 782.

V.

**Appellant Deering-Milliken Is Subject to Liability
Upon the Contract Made by Its Regional Man-
ager, Mr. Lee Piersol.**

A. It is respectfully submitted that Appellant cannot escape liability on the ground that Mr. Piersol was not authorized to conduct and conclude negotiations with the Appellee. Such liability can be easily predicated on any of the following three bases:

- (a) actual authority;
- (b) apparent or ostensible authority;
- (c) agency by estoppel.

See: *Rest of Agency*, Vol. 1, Sec. 140.

1. Actual authority is defined in Section 2316 of the Civil Code of California, as follows:

“Actual authority, what. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.”

Appellee urges that it must be held that Lee Piersol had actual authority to conduct the negotiations with the Appellee on behalf of the Appellant, and to subject the latter to liability. The transcript amply supports the conclusion that Lee Piersol had been permitted to believe that he possessed such actual authority. It is to be observed that on examination of Mr. Piersol, under Rule 43(b) Federal Rules of Civil Procedure, he testified that he did not have the final decision on “lots of things that go through my office.” [T. R. p. 339.] However, it is submitted that in this respect at least, the credibility and veracity of Mr. Piersol has been completely impeached.

Such impeachment is demonstrated at pages 338 and 339 of the Transcript, wherein appears portions of the deposition of Mr. Piersol, taken on March 31, 1953, and April 2, 1953, and where appear the following statements by Mr. Piersol:

“Q. And final decisions, such as they may be with respect to business in the local office, are made by you? A. Yes, sir.

Q. You are the gentleman with the so-called final say on all matters having to do with the conduct of the local office, is that correct? A. That is correct.

Q. And that has been the case since 1943 up to date? A. Yes.”

Certainly such statements indicate that Mr. Piersol did not know of or believe that there were any limitations on his authority. And nowhere in the transcript is there one iota of testimony by any of those superior in authority to Mr. Piersol reflecting any lack of actual authority in him.

Further, it was not the duty of the plaintiff to prove the actual authority of Mr. Piersol to contract on behalf of the defendant.

Morton v. Kohler & Chase, 70 Cal. App. 458, wherein, at page 461, the Court said as follows:

“The argument that plaintiff was required to prove the actual authority of the piano salesman to make the contract for the defendant is also without merit. The persons with whom plaintiff dealt were placed in the store of defendant for the purpose of dealing with customers in regard to pianos. They certainly had ostensible authority, upon which the plaintiff was entitled to rely. Defendant is con-

tending for a rule which would seriously embarrass it in the conduct of its business, for if each person who deals with the Kohler & Chase Company must pause and ascertain the exact scope of the authority of the salesman negotiating the transaction, we apprehend that the trouble and uncertainty involved will cause a material decrease in the number of transactions.”

B. Again and by the same token, can there be any doubt that Mr. Piersol had ostensible authority to act for and subject the Appellant to liability? Such authority is also defined in our statutes.

Sec. 2317, Civ. Code.

“Sec. 2317. *Ostensible authority what.* Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.”

The extent of one's authority is, of course, a question of fact.

1 *Cal. Jur.* p. 716, Sec. 21;

Correa v. Quality Motor Co., 118 Cal. App. 2d 246, 251.

How glaring do these facts stand out in the record of this case:

(a) Every document bearing the signature of Mr. Piersol, other than Appellant's intra-office communications, are over the designation “Regional Manager,” which Mr. Piersol testified was his official capacity. [T. R. p. 339.]

(b) Nothing appears in the record to the effect that Appellant ever advised the Appellee that Mr. Piersol was without authority to act on behalf of the Appellant.

(c) All of Appellant's intra-office communications, particularly Defendant's Exhibits 19-30, inclusive, reveal that Appellant's New York office was permitting and had permitted Mr. Piersol to conduct *all phases and details* of the negotiations.

(d) The Appellee, through Mr. Mills, relied on the conduct of Mr. Piersol, and upon the situation which the Appellant's New York office thus permitted to appear and exist as to Mr. Piersol's authority, and plaintiff acted in accordance with such reliance.

Secs. 2300-2334, Civ. Code:

See: *County First National Bank v. Coast Dairies*,
46 Cal. App. 2d 355, 366.

The rationale of the doctrine of liability based upon ostensible or apparent authority has been recently stated in the case of *Correa v. Quality Motor Co.*, *supra*, 118 Cal. App. 2d, at pp. 252-253, as follows:

“ ‘Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.’ (Citations.) In *Safeway Stores v. King Lbr. Co.*, 45 Cal. App. 2d 17, 23 (113 P. 2d 483), it is said that, ‘Where a principal makes it possible through his acts, for his agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent where his own conduct has invited those dealing with him to assume that the agent possessed such authority. In such a case, a principal is bound by his acts and is estopped by his own conduct from denying the authority of the agent to act.’ And as this Court

said in *Gaine v. Austin*, 58 Cal. App. 2d 250, 260 (136 P. 2d 584), 'Agency may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power.' . . . For as is said in *Carter v. Rowley*, 59 Cal. App. 486, 489 (211 Pac. 267): 'As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transactions to put the purchaser on notice that the agent is exceeding his authority.' "

Accord: *Carstens Packing Co. v. Miller*, 10 Cal. App. 2d 48, 50;

Sauble v. Gary Southcoast Agency, 56 Cal. App. 606, 611-612;

See: *McKee v. Mires*, 110 Cal. App. 2d 517, 521.

The conclusion seems inescapable that the case at bar falls within the purview of this doctrine.

C. As to the liability of the Appellant predicated on the doctrine of estoppel, it is submitted that the authorities hereinabove cited in support of Appellee's contention that Appellant is estopped to deny its liability on contract [Pltf. Exs. 6 and 7] are fully applicable as authority in support of Appellee's contention that the Appellant is estopped to deny that Mr. Piersol had actual, as well as ostensible authority to act and contract on Appellant's behalf.

VI.

**Appellee Is Entitled to Recover the Loss of Profits
Suffered by Virtue of Defendant's Non-performance of the Contract.**

Sec. 3300, Civ. Code;

Noble v. Tweedy, 90 Cal. App. 2d 738, 745;

Western Industries Co. v. Mason Malt Whiskey Co., 56 Cal. App. 355, 364;

Williston on Contracts, Sec. 1356;

Patty v. Berryman, 95 Cal. App. 2d 159, 171;

Hadley v. Baxendale, 9 Exch. 341.

A. The law is well established that where there are special circumstances made known to a seller at or before the making of a contract, from which it might reasonably have been foreseen that non-delivery by the seller will, in turn, cause a breach of the buyer's contract with a customer, and the two contracts are in fact breached, the damages recoverable from the seller who is in default, are the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated.

House Grain Co. v. Finerman, 116 Cal. App. 2d 483, 495, 497;

Patty v. Berryman, *supra*, 95 Cal. App. 2d 159, at p. 171;

Hacker etc. Co. v. Chapman Co., 17 Cal. App. 2d 265, 267-268.

In effect, this rule is that where there is knowledge of these special circumstances, the parties are deemed to have contracted on the terms of being liable if the seller

forced the purchaser to a breach of the latter's contract with a customer.

See: *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85;
Accord: *Booth v. Spuyten Mill Co.*, 60 N. Y. 487,
494;

Globe Refining Co. v. Landa Cotton Oil Co., 190
U. S. 540, 543.

B. *A fortiori*, the rule must follow that where a seller is properly chargeable with knowledge and notice of the resale by the purchaser and knows that the goods are intended to fulfill a resale contract, the special damages recoverable for the breach of the principal contract include loss of profits which would have been gained by the buyer under the resale contract had the seller performed his agreement. This rule finds support in the leading case of:

Messmore v. New York Shot and Lead Co., 40 N. Y. 422, wherein the Court, after expressing the general rule as to the measure of damages, said the following:

“ . . . and is changed when the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such contract and the vendor agrees to supply the article to enable him to fulfill the same, because those profits *which would accrue to the purchaser upon fulfilling the contract of resale may justly be said to have entered into the contemplation of the parties in making the contract.*” (Emphasis added.)

The courts of California have expressed approval of this rule in the recent case of:

Beatty v. Oakland Sheet Metal Co., 111 Cal. App.
2d 53, 67.

See:

Patty v. Berryman, *supra*, 95 Cal. App. 2d at 171.

Accord:

Western Industries Co. v. Mason Malt Whiskey Co., *supra*, 56 Cal. App. 355 at 364.

Can there be any doubt in the case at bar that the Appellant at all times from the commencement of negotiations with the Appellee knew the purpose for which the goods were being purchased, and that they were being purchased so as to comply with United States Government specifications, that they were to be used in the manufacturing of ordnance material, and that they could only be resold to the United States Government by a contract executed in accordance with the law?

The transcript is replete with testimony out of the mouths of Appellant's own witnesses that they knew all of these matters from the very commencement of negotiations, that is December 21, 1951, and thereafter. [T. R. pp. 449, 544, 554-555, 562-563, 623-624, 627, 356, 376-377, 296, 672-673.]

C. It is further the law that the liability of a seller in case of a breach by him to reimburse a buyer for losses sustained through non-performance of a contract of resale is not conditioned upon the existence of the resale contract at the moment of the execution of the original contract; it may arise where the seller has knowledge that such a contract is in the contemplation of the buyer.

Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 N. Y. Supp. 71;

Matter of Casualty Co. of America, 250 N. Y. 410, 165 N. E. 829;

Williston on Contracts, Sec. 1347.

D. It has also been held that where a seller has notice of the resale or the intended resale, the right to recover for loss of profits on such resale is not affected by the fact that such resale was not mentioned in the contract of sale.

Howard Supply Co. v. Wells (C. C. A. 6th), 176 Fed. 512;

Rogers-Morgan Co. v. Webb, 34 Ga. App. 424, 130 S. E. 78.

See:

Ozmo Oil Refining Co. v. Cotton Oil Co. (C. C. A. 9th), 278 Fed. 722.

By the same token, it is not necessary as a condition precedent to the recovery of lost profits that the seller know the resale price or the amount of the purchaser's profit at the time of the making of the original contract of sale.

Sedro Veneer Co. v. Swapil, 113 Pac. 1100;

Edwards Manufacturing Co. v. Bradford Co. (C. C. A. 2d), 294 Fed. 176, 182-183;

Delafield v. A. K. Armsby, *supra*, 116 N. Y. Supp. 71, *aff'd* 92 N. E. 1082;

Standard Pipe and Supply Co. v. Oil State Supply Co., 145 Okla. 143, 292 Pac. 12;

Martin v. Neer, 269 Pac. 342.

E. And finally there is law in support of plaintiff's claim to an award in the sum of \$4,100.66, this being the amount claimed by the United States Government for

breach of the contract between the government and the plaintiff herein. [Pltf. Exs. 10, 13 and 14.]

House Grain v. Finerman, *supra*, 116 Cal. App. 2d 485, 497;

Buckbee v. P. Hohenadel Co. (C. C. A. 7th), 224 Fed 14;

In the case of *House Grain v. Finerman*, cited above, the facts were substantially similar to those in the case at bar. In the cited case the damages was not a fixed liability in the sense that a third party had imposed an obligation by legal action for the payment thereof. So too, in the case at bar, the sum of \$4,100.66 is an item for which a claim seems clearly to have been established by the government of the United States. It is interesting that the Appellant, in its opening brief, at page 72, concedes that the cited case is ample authority for the recovery of the said sum of \$4,100.66.

F. The Appellant has misconstrued the theory upon which the Appellee seeks a recovery for loss of profits. Such recovery is based not upon the difference between the contract price and the market value of certain goods, but rather simply upon the difference between the price at which Appellee was to receive goods from the Appellant, and the price at which these goods would have been sold to the Government, less the cost of production, with the resultant net profit. The authorities cited by the Appellant are valid only in a case where the measure of damages is the ordinary one, to-wit, the difference between the contract price and the market value of goods. (See,

Buyer v. Mercury T. C. & F. Co., 92 N. E. 2d 896, 20 A. L. R. 2d 815-8.) Thus, the absence of a Finding as to the availability or non-availability of these goods in the open market is immaterial, for the measure of damages is based upon that portion of the language of Section 3300 of the Civil Code, reading as follows:

“For the breach of an obligation arising from contract the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby”

Accord:

Grupe v. Glick, 26 Cal. 2d 680, 690-691.

In summary, the evidence is clear that Appellee had a contract with the United States Government under which Appellee would have been paid the sum of \$70,725.98. [Pltf. Ex. 12.]

It is further established that the cost of producing the liners would have been \$66,304.38. Thus, plaintiff would have realized a profit of \$4,421.60, which together with the sum of \$4,100.66 is the proper measure of damages under the authorities above cited.

VII.

Appellant Had It Within Its Power to Call Witnesses Who Might Disprove Appellee's Testimony as to Its Negotiations With the Appellant, but Failed so to Do; It Is Presumed, Therefore, That If Such Witnesses Had Been Produced, Their Testimony Would Support Appellee's Case.

Hays v. Viscome, 122 Cal. App. 2d 135, 139;

Bone v. Hayes, 154 Cal. 759, 765.

In the latter case, the rule is enunciated as follows:

"It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary."

Accord:

Freitas v. Peerless Stages, Inc., 108 Cal. App. 2d 749, 761;

Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 397-398.

A. Appellee suggests that there was one person, an officer of the Appellant, whose testimony could have shed great and revealing light on this controversy. This person was J. C. Harris, Vice-President of the Appellant. [T. R. p. 430.] It was he who could have cast the illumination of truth on these questions:

1. Did the New York office of the Appellant act in a manner that was consistent with its contention that there was no contract between Appellee and Appellant.

2. What limitations, if any, had been placed on the actual authority of Mr. Piersol?

3. Why was Appellee never advised until after March 21, 1952, that the goods would require further finishing, especially in the light of Mr. Lovett's testimony that the Appellant knew as early as December, 1951, that the goods would not meet the specifications "in the greige"? [T. R. p. 627.]

4. Why, if it was always known to the Appellant that the goods "in the greige" would not meet the specifications, was it necessary to run the "test just completed" [Pltf. Ex. 11] to ascertain whether the goods in the greige would meet the porosity specifications of PA-PD-29?

5. Upon what basis could Appellant reconcile its claim that Appellee knew what further finishing would be required with the contents of Defendant's Exhibit L, which indicated that government inspectors would inspect the goods at the mill and *with Mr. Piersol's testimony that he understood that such inspection was for the purpose of seeing whether the goods met the specifications?* [T. R. pp. 553-554.]

B. Furthermore, the testimony of Mr. Howard B. Drake, an Ordnance Department employee at all times pertinent to this case, wherein he related his conversation with Mr. J. C. Harris, stands without contradiction in the record. [T. R. p. 485.]

It is submitted that this testimony is susceptible of but one interpretation—that the Appellant well knew that it had not performed according to the terms of the contract with the Appellee. If Mr. Harris could have testified honestly that there was no agreement with the Appellant at the time of the sending of Plaintiff's Exhibit 11, or

that Appellee had been told that there was no contract until a formal "sales note" was drawn, or that Appellee had been told that further finishing was required, would defendant not have produced Mr. Harris, or could not Mr. Harris simply have told Mr. Drake that it made no difference what Deering-Milliken proposed to do, since it was not bound to furnish any goods? Would this not have been a logical answer to Mr. Drake if such was indeed the fact?

After all, this is the crux and heart of the Appellant's defense—that there was no contract. Appellant has certainly failed to pump any life's blood into that defense, when Mr. Harris might well have done so.

It is to be observed that the Appellant produced Mr. McEwen from New York. [T. R. pp. 656, 662.]

It is to be observed that the defendant produced Mr. Lovett—twice—from New York. [T. R. pp. 616, 674.]

Where was Mr. Harris?

It would seem to be crystal clear, therefore, that the presumption announced in the case of *Bone v. Hays*, *supra*, 154 Cal. at p. 756, is properly invoked in the case at bar, and, accordingly, that had Mr. Harris been called upon to testify, he would have supported Appellee's position.

Conclusion.

Appellee sincerely urges that the authorities hereinabove cited, and the argument hereinabove presented, fully support Appellee's position and fully substantiate Appellee's right to recovery.

Appellee has studiously avoided a reference to the testimony of Mr. Mills, except perhaps in the matter of

corroborating defendant's testimony. Every proposition presented by Appellee finds support in cited references in the transcript, to testimony adduced by the Appellant. In fact, no consideration whatever need be given to the testimony of Mr. Mills for it is submitted that Appellee's case has been made out in the testimony and documentary evidence given and produced by the Appellant.

Counsel for the plaintiff has in fact labored strenuously and diligently to keep at the safest permissible minimum the length and breadth of this brief. The process of appraising and reappraising the relative value of the myriad of items of evidence has not been a simple one.

Except in one instance, Appellee has studiously refrained from raising the issue of the truth and veracity of Appellant's witnesses. This is no admission or suggestion that the truth and veracity of the Appellant's witnesses, particularly Mr. Piersol, may not be impeached by references to the transcript. Appellee is content to rest upon the merits and upon the law.

Appellee earnestly and sincerely submits to this Honorable Court that the Judgment of the Honorable District Court should be affirmed.

Respectfully submitted,

AARON L. LINCOFF and
GILBERT KLEIN,

By AARON L. LINCOFF,

Attorneys for Appellee.

Dated: January 18, 1955.

No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,

Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for
The Southern District of California, Central Division.

Hon. Ernest A. Tolin, Judge.

APPELLANT'S REPLY BRIEF.

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**PAUL P. O'BRIEN,
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Hon. Ernest A. Tolin, Judge.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

In the statement of facts contained in appellant's opening brief (pp. 6-20), appellant attempted to set forth a fair summary of the evidence presented to the district court by both appellant and appellee. No attempt was made to beg the question by stating as a fact that which is in issue on this appeal. Appellee has not been so generous since its statement of facts (pp. 2-5) assumes as true those conclusions which are in dispute and which are yet to be decided by this Court.

At pages 6 and 7 of its brief appellee has attempted to discredit two small portions of appellant's "Statement of the Case" appearing at pages 3 and 17 of appellant's opening brief. Appellant is not intimidated by this attempt and in refutation invites this Court to read the Transcript of Record as cited in appellant's opening brief on said pages.

More important to this appeal, appellant, in its opening brief, placed before this Court certain basic arguments for reversal of the judgment of the district court. For the most part appellee's brief makes no attempt to meet these arguments. Where an argument is met, however, appellee seeks to confuse rather than to refute it. In order that the failure of appellee to meet or refute appellant's arguments, or the authorities cited in support thereof, may be properly brought to this Court's attention, appellant in this its reply brief will consider in turn each of its arguments and appellee's reply thereto.

ARGUMENT.

Broadly speaking appellant's arguments for reversal related to two areas: the existence of a contract and the propriety of the damages awarded appellee. Under these two general headings appellant argued the sufficiency of the evidence, the sufficiency of the findings of fact, and the inconsistent and conflicting nature of the findings of fact, the conclusions of law and the judgment.

Appellee's first response to all of these arguments is that appellant ". . . has devoted all, or substantially all, of its brief to arguing the evidence . . ." (App. Br. p. 8.)* Appellee then seeks to establish in the next four pages of its brief that which is conceded at page 22 of appellant's opening brief. In so doing appellee completely ignores the arguments of appellant that the findings of fact are insufficient and fatally inconsistent and that the conclusions of law and judgment are both conflicting and not supported by the findings of fact. Appellee's reluctance to meet these issues evidences the correctness of appellant's appeal.

*For convenience Appellee's Opening Brief is hereinafter referred to as "App. Br."; and Appellant's Opening Brief is hereinafter referred to as "A. O. B."

I.

Appellant's first argument for reversal was that:

The Findings of Fact With Respect to the Existence of a Contract Are Insufficient, Inconsistent and Conflicting and Not Supported by the Evidence.

A. The Evidence Is Wholly Insufficient to Support the Finding That Appellant and Appellee Entered Into a Written Contract on March 6, 1952.

Pursuant to this argument, appellant showed that appellant did not consent to be bound by contract or intend to enter into an agreement on March 6, 1952 (A. O. B. pp. 24-32) and that even assuming an exchange of an offer and an acceptance, appellant and appellee did not agree upon the same thing in the same sense. (A. O. B. pp. 32-38.) This lack of mutual assent was shown by the very letters of March 6, 1952, found by the district court to constitute a valid contract and by the testimony and admitted conduct of appellee's president, Mr. Mills.

To this appellee replies in its brief at the pages hereinafter noted that these letters contain all of the essential items necessary to the formation of a contract to sell (p. 17); that a contract may be expressed or may be implied (pp. 17-18); that an agreement of sale need not be evidenced by a formal contract drawn with technical exactness (p. 18); and that these letters satisfy the statute of frauds or that in any event appellant is estopped to rely on the statute of frauds. (pp. 18-19.)

Appellee's contentions in this regard may be true but they are not pertinent to the issue raised by appellant, to wit: that there was no mutual assent between appellant and appellee sufficient to support the existence of a contract. Appellee makes no effort to meet and answer the fact that these letters [Pltf. Exs. 6 and 7] were in the one instance directed to the "Government Procurement Office"—not to appellee—and in the other instance merely

an acknowledgment of appellee's "order" which was conditioned on appellant's ". . . ability to handle the business when you (appellee) are in a position to confirm it."

Lack of mutual assent was shown by appellant in another way, for even if it be assumed that the parties intended a contract, it is clear that appellant and appellee did not agree upon the same thing in the same sense. (A. O. B. pp. 32-38.) Appellee's only effort to meet and answer this argument is contained at pages 26-27 of its brief where it is stated that Mr. Mills' understanding of the phrase "in the greige" was in complete accord with that of every witness called on behalf of appellant. This is just not so, for a careful reading of the record shows positively that *at the time the alleged contract was made*, as distinguished from the time of trial, Mr. Mills believed that the phrase "in the greige" referred to the *color* of cloth rather than to all of its natural characteristics as it comes off the loom. [Tr. I, pp. 78-79, 165-178.] Mr. Mills made this clear in his direct testimony [Tr. I, pp. 78-79] even though appellee did not see fit to bring it to the attention of this Court. Mr. Mills also made this clear when he admitted that *the fact that some of the replies received by him to his inquiries from other sources quoted on finished goods and others on greige goods meant nothing to him*. [Tr. I, pp. 182-187; Tr. II, p. 572.]

Appellant's next contention under its first argument for reversal was that:

B. The Findings of Fact Concerning the Written Contract of March 6, 1952, Are Fatally Inconsistent, Conflicting and Uncertain.

Pursuant to this argument, appellant pointed out that the findings of fact themselves—not the evidence—showed that the terms of the contract found by the trial court were not complete and certain (A. O. B. pp. 39-41) and that at

most appellant and appellee agreed to enter into negotiations and to agree upon the terms of a contract in the future. (A. O. B. pp. 42-48.) Appellant showed that the inconsistency of the findings in either of these respects justified a reversal of the judgment of the district court.

In reply to appellant's argument that the March 6th contract was incomplete and uncertain, appellee contends that a change from two widths of cloth to one after the date of the alleged contract is insignificant. (App. Br. pp. 20-23.) In support of this contention appellee cites cases purporting to hold that an agreement which gives the buyer an *election* to select the style or type of goods specified in the contract is nevertheless sufficiently definite as to be enforceable. Again, this may be the law but it is not applicable to the facts presented on this appeal since the March 6th letters show on their face that here there was never such an election considered. Furthermore, it was not merely the width of cloth that was left uncertain on March 6, 1952. As summarized at pages 29-31 and 43 of appellant's opening brief, each and every important term of the alleged contract was changed after March 6, 1952, including the quantity of cloth, the widths of cloth, the price per yard, the credit arrangements, the delivery dates, instructions on shipping, packaging and seconds, and the total purchase price of the goods. Under such circumstances, appellee's authorities are not in point.

Appellee then seeks to bolster its argument by referring to the principle that the law does not favor the destruction of contracts because of uncertainty. (App. Br. pp. 23-24.) But these authorities equally establish that the essentials of the contract must be agreed upon and be ascertainable. From the conflicting findings of fact it is at once apparent that this requisite of a valid contract has not been met.

Appellee next contends, and for the very first time, that the changes made *eight days after* March 6, 1952,

amounted to a *modification* of the March 6th contract “and hence removed whatever uncertainty might have been theretofore existent.” (App. Br. p. 25.) This is truly an amazing argument. In the first place, it has always been contended by appellee [Tr. I, p. 212] that the changes of March 14, 1952, were made for the purpose of *confirming* the terms of the March 6th contract. In the second place, appellee does not explain how it is possible to modify an agreement which is uncertain and therefore not an agreement. In the third place, appellee does not explain how Plaintiff’s Exhibit 8 attains the position of an agreement of modification since on its face it purports to be nothing more than a memorandum of an order which is subject to acceptance or rejection by the particular mill involved. These spurious arguments by appellee once again illustrate appellee’s utter frustration at attempting to discover a theory upon which the existence of a contract might be sustained when in fact the minds of the parties had never met.

Appellee’s final reply to appellant’s contention that the March 6th contract is uncertain is a reference to the testimony of Mr. Mills and of Mr. Piersol to the effect that all of the terms mentioned in the alleged contract of March 6, 1952, had been discussed prior to March 6th. (App. Br. p. 26.) From this it argued that the alleged contract was definite and certain since the parties had already discussed the terms mentioned therein. This argument, however, overlooks the fact that appellant and appellee *continued to discuss* each and every term mentioned in the letters, as well as terms not previously discussed, for eight days *after* the March 6th letters were written. (A. O. B. pp. 29-31.) If the contract was complete and certain on March 6, 1952, as appellee contends, there would have been no need for these continued negotiations and discussions.

II.

The Principle of Estoppel Has No Application to the Facts Presented by This Appeal.

A. All of the Elements Constituting an Alleged Estoppel Must Be Affirmatively Alleged.

At pages 12-14 of its brief, appellee argues that appellant is estopped to deny the existence of a valid contract between appellant and appellee. Apart from the merits, this argument is not available to appellee since estoppel was in no way pleaded or relied upon by appellee at the trial of this action. It is well established that the person who seeks to rely upon an alleged estoppel must affirmatively allege all of the elements constituting the estoppel.

Silva v. Linneman, 73 Cal. App. 2d 971, 976, 167 P. 2d 794, (1946);

Fleishbein v. Western Auto S. Agency, 19 Cal. App. 2d 424, 427-428, 65 P. 2d 928 (1937);

Producers Holding Co. v. Hill, 201 Cal. 204, 256 Pac. 207 (1927);

Krupp v. Mullen, 120 Cal. App. 2d 53, 260 P. 2d 629 (1953).

Appellee argues to the contrary, citing cases purporting to hold that in a plaintiff's pleadings estoppel need not be pleaded. (App. Br. pp. 14-15.) These cases, however, are not authority for such a general rule. They stand only for the proposition that a plaintiff need not plead an estoppel in anticipation of one of defendant's defenses or where the facts underlying the estoppel are raised for the first time in defendant's answer. Such is not the case at bar, for appellee was the party who had the opportunity to plead the alleged estoppel upon which its cause of action depended. Consequently, it was incumbent upon appellee to plead the estoppel with fullness and particularity.

Appellee then argues that its Complaint sufficiently pleads all of the requisite elements of an estoppel. (App.

Br. p. 14.) The answer to this, of course, lies in the allegations of the Complaint. [Tr. I, pp. 3-16.] It is entitled: "Complaint for Damages for Breach of Contract." Even a cursory reading of this Complaint shows that it is completely devoid of any allegation of an estoppel. Moreover, in his opening statement counsel for appellee unequivocally stated that the action was to recover damages for breach of contract. [Tr. I, p. 44.] This was also appellant's understanding of appellee's alleged cause of action as indicated by its counsel at the time of trial. [Tr. I, p. 67.] In fact, the trial judge asked appellant's counsel before the first witness was called whether any principle of estoppel was involved. Appellant's counsel replied in part:

"I find them unpleaded . . . As we understand it from the pleading and presentation of counsel, this action is based upon a written agreement of March 6, 1952. If we are mistaken with respect to that, why, we would be happy to have it clarified both in the pleading and here orally." [Tr. I, p. 67.]

In response, appellee made no attempt to indicate either to the court or to appellant that an estoppel was part of its cause of action.

Appellee then contends that appellant has waived the defect in the pleading because the record ". . . is devoid of a valid objection by Appellant to the introduction of testimony by the Appellee in support of liability predicated upon the theory of estoppel." (App. Br. p. 15.) Appellee's conclusion, however, does not follow from its premise for at no time did appellant have the opportunity to interpose such an objection. Appellee's testimony in this regard was relevant to the issue of the formation and existence of a contract, its alleged breach and appellee's claimed damages. In view of appellee's statement of the nature of appellee's cause of action, appellant submits that no objection on its part was required or even appropriate.

B. The Findings of Fact and Evidence Are Insufficient to Establish an Estoppel.

Assuming that appellee has properly pleaded an estoppel, the findings of fact and the evidence are insufficient to establish appellant's liability on that theory. In substance appellee argues that appellant represented to appellee that the letters of March 6, 1952, constituted a contract and that appellee reasonably relied upon such representation to his injury. Appellee concludes that appellant is therefore estopped to deny the fact that a contract did exist. (App. Br. pp. 12-14.)

Appellee's specific argument on the facts of the case, however, confuses the issue. It is difficult to determine whether appellee is arguing that appellant is estopped to deny the existence of a contract or whether appellee is arguing that the contract which was otherwise established provided for the sale of greige goods which met the required military specifications. In either event, appellee's premises are not supported by the evidence or the law and therefore appellee's conclusions must fail.

Appellee first claims that Exhibit 6 was intended to induce action and conduct on the part of *appellee*. This is palpably untrue as shown by its very terms, for the last sentence expressly states, "This memo is written with the idea of submitting (it) to the Government Procurement Office." Exhibit 6 was not directed to appellee and therefore could not have been intended to induce action on the part of appellee.

People v. Main, 75 Cal. App. 471, 476, 242 Pac. 1078 (1925).

On the other hand, appellee would ignore Exhibit 7 which *was* directed to appellee and which made it clear that there was not a contract existent between appellant and appellee. The second paragraph of this letter shows that it is nothing more than an acknowledgment of appellee's "or-

der” for cloth which was being relayed to appellant’s home office in New York. Moreover, the closing portion of the letter shows that the minds of the parties had not met, for it provides, “. . . and, of course, the whole thing is predicated on our (appellant’s) ability to handle the business when you are in a position to confirm it.”

It thus appears not only that no representation was made to appellee that a contract existed but also that appellee knew that in fact no contract existed. Under such circumstances appellee may not assert an estoppel since appellee cannot show that it relied upon the March 6th letters. [Pltf. Exs. 6 and 7.] Reliance is a necessary element to an estoppel, and the reliance must be reasonable. It cannot be reasonable, however, where the full facts are known to the person asserting the estoppel.

Development Co. v. Seaboard D. C. Corp., 1 Cal. 2d 121, 128, 34 P. 2d 139 (1934);

American Nat. Bk. v. A. G. Sommerville, 191 Cal. 364, 372-373, 216 Pac. 376 (1923);

Young v. Bank of California, 88 Cal. App. 2d 184, 198 P. 2d 543 (1948);

Estate of Jackson, 112 Cal. App. 2d 16, 18, 245 P. 2d 684 (1952).

III.

Appellant's second argument for reversal was that:

The Judgment, Conclusions of Law and Findings of Fact With Respect to Appellee's Damage Are Insufficient, Conflicting and Not Supported by the Evidence.

A. The Trial Court Has Failed to Find That There Was No Available Market for the Goods in Question.

Pursuant to this argument, appellant showed that the measure of damages contended for by appellee had no application unless it was first found by the trial court that there was not an available market for the goods in question. Without such finding appellant pointed out that appellee could not recover either its alleged loss of profits or damages allegedly due from appellee to the United States. The necessity of such a finding is one of law and its absence constitutes reversible error. (A. O. B. pp. 51-54.)

To this appellee replies that appellant has misconstrued the theory upon which appellee seeks a recovery for loss of profits—that such recovery is not based upon the difference between the contract price and the market value of certain goods. (App. Br. pp. 43-44.)

But appellant has not misconstrued appellee's theory! Appellant's point is that appellee's theory for recovery *cannot, as a matter of law, apply* unless and until it is found as a fact that there is no available market for the goods in question. Such is the precise holding of the court in *Grupe v. Glick*, 26 Cal. 2d 680, 160 P. 2d 832 (1945), as set forth in appellant's opening brief at pages 51-53. Appellee has erroneously cited the *Grupe* case to the con-

trary. (App. Br. p. 44.) At the pages referred to by appellee, the court discusses the measure of damage, applicable where the *goods have already been delivered* to the buyer which is clearly not the case presented on this appeal.

Appellee also cites a portion of California Civil Code Section 3300 in support of its position that the availability or non-availability of these goods in the open market is immaterial. In so doing appellee omitted the following words appearing in that code section: “. . . except where otherwise expressly provided by this code . . .” What is significant is that the Civil Code does “otherwise provide” for the measure of damages applicable to a breach of contract for the sale of goods. (Civ. Code, Sec. 1787(3).) Again, appellee’s authorities do not support its position.

At pages 39-41 of its brief, appellee cites several cases for the general proposition that appellee is entitled to recover loss of profits as an element of its damage. Of these, *Noble v. Tweedy* and *Hacker etc. Co. v. Chapman Co.* do not even concern contracts for the sales of goods. Appellee also relies upon *Patty v. Berryman*, 95 Cal. App. 2d 159 (1949) and *Western Industries Co. v. Mason Malt Whiskey*, 56 Cal. App. 355 (1922). But again, these cases do not support appellee’s position. At pages 171-172 of the *Berryman* case and at page 364 of the *Western Industries* case, the appellate court explicitly states that it had been found by the trial court that there was no available market for the goods in question. Upon such finding it was then proper to allow loss of profits as an element of damage.

Bercut v. Park, Benziger & Co., 150 F. 2d 731 (9th Cir., 1945).

The absence of such a finding or any evidence to support such a finding, is one of the grounds appellant believes requires reversal of the trial court’s judgment in the case at bar.

Appellant also argued that:

**B. The Findings in Regard to Loss of Profit Are Insufficient,
Conflicting and Not Supported by the Evidence.**

**1. LOSS OF PROFITS CLAIMED BY APPELLEE ARE TOO
REMOTE, SPECULATIVE AND UNCERTAIN TO BE RE-
COVERED.**

Here appellant pointed out that appellee was not entitled to recover its alleged loss of profits for another reason since it was a new enterprise engaging in a new industry. In this connection it is well established as a matter of law that where the company seeking to recover damages is a new venture without any previous experience in the industry, loss of profits cannot be included as a part of the damages recoverable because there is no base upon which to prove what its profits would have been. (A. O. B. pp. 55-62.)

Appellee made no reply to this argument.

**2. THE FINDINGS OF FACT WITH RESPECT TO GROSS
RECEIPTS ARE INCONSISTENT AND NOT SUPPORTED
BY THE EVIDENCE.**

Pursuant to this argument, appellant pointed out that the district court's calculation of appellee's prospective profit was, as shown by the uncontradicted evidence and the findings themselves, excessive in the amount of \$1,386.78—assuming, of course, that loss of profit was recoverable at all. (A. O. B. pp. 63-65.)

Appellee made no reply to this argument.

Appellant next argued that:

C. The Findings, Conclusions and Judgment With Respect to the Money Claimed by the United States Are Insufficient, Conflicting and Not Supported by the Evidence.

Under this heading, appellant set forth four separate arguments any one of which requires a reversal of the district court's judgment. These arguments are:

1. The conclusions of law and the judgment with respect to the money claimed by the United States are insufficient, inconsistent and contingent. (A. O. B. pp. 65-68.)
2. Damages for which appellee might be liable to the United States were not within the contemplation of the parties. (A. O. B. pp. 68-71.)
3. The fact of appellee's liability to the United States has not been established. (A. O. B. pp. 71-74.)
4. The amount of appellee's alleged liability to the United States has not been established with any reasonable certainty. (A. O. B. pp. 74-76.)

With one exception, appellee made no reply to any of these arguments. Appellee's sole reply appears at page 43 of its brief where it is stated that appellant concedes at page 72 of its opening brief that the case of *House Grain Co. v. Finerman & Sons*, 116 Cal. App. 2d 485, 253 P. 2d 1034 (1953), is ample authority to support the award of \$4,100.66 to the United States Government. This is ridiculous, as a reading of appellant's opening brief will show.

Conclusion.

In its opening brief appellant advanced several arguments for reversal, any one of which standing alone represents sufficient ground for reversal of the judgment of the district court in the within action. These arguments related to two general areas: the existence of a contract and the propriety of the damages awarded appellee. For the most part appellee's brief neither meets nor answers these arguments of appellant, but is instead limited to misstatement and the irrelevant. In this connection, appellee, at pages 29-38 of its brief, deals with the question of duty to mitigate damages and the question of the authority of Mr. Piersol to act for appellant. While appellant does not concede that appellee is correct in these particulars, appellant did not feel justified in extending its brief to include an appeal on these issues. On the other hand, appellant did present on this appeal several arguments relating to the trial court's incorrect measure of damages as applied to this case. To these arguments appellee makes no reply whatsoever. Such absence of answer is no reflection of a lack of time or effort in search therefor but is indeed a full reflection of the weakness of the position adopted by appellee.

Appellant's arguments for reversal, as set forth in detail in its opening brief, stand unimpeached, and for the most part unchallenged. Accordingly, appellant respectfully urges the Court to reverse the judgment of the district court.

Dated: January 27, 1955.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,
Attorneys for Appellant.

JAMES S. CLINE,
Of Counsel.

No. 14481
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & Co., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee.

Appeal From the District Court of the United States for the
Southern District of California, Central Division. Hon-
orable Ernest A. Tolin, Judge.

PETITION OF APPELLEE FOR REHEARING.

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Attorneys for Appellee.

FILED

DEC 16 1955

PAUL P. O'BRIEN, CLERK

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I.

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No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,

Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for the
Southern District of California, Central Division. Hon-
orable Ernest A. Tolin, Judge.

PETITION OF APPELLEE FOR REHEARING.

*To the Honorable Albert Lee Stephens and James Alger
Fee, Circuit Judges, and the Honorable John Wiig,
District Judge, of the United States Court of Appeals
for the Ninth Circuit.*

Appellee, Modern-Aire of Hollywood, Inc., a corpora-
tion, respectfully petitions this Honorable Court for a
rehearing in this cause upon the following ground:

That this Honorable Court has erroneously held, as a
matter of law, that there is no sufficient basis for the
allowance of damages in favor of Appellee for loss of
anticipated profits.

Preliminary Statement.

Appellee earnestly submits that the judgment of the Court adjudging that there is no sufficient basis for the allowance of damages for loss of anticipated profits is improper and against the law properly applicable to the facts in this cause. The judgment of the Court in this respect was predicated upon the fact that as Appellee's previous business experience was not shown to have been a profitable one, there was no basis upon which any reasonable calculation of damages could be made.

Appellee respectfully suggests that this Honorable Court has applied principles of law not properly applicable to the pertinent facts. These facts are the following:

(a) There had been awarded to the Appellee, by the United States Government, a written and properly executed contract pursuant to the terms of which the Appellee would have been paid the sum of \$70,725.98 [Pltf. Ex. 12] upon performance of the contract.

(b) Appellee had submitted to the United States Government, in accordance with standard and required procedure, a proposal pursuant to which the Appellee set forth its estimated costs of production of the ordnance materiel provided for in the contract. [Deft. Ex. CC; T. R. pp. 192-194.] The cost of production would have been \$66,304.38.

I.

The Proper Measure of Damages Was the Difference Between the Cost to Appellee of Production of the Goods (\$66,304.38) and the Price Which the Appellee Was Entitled to Receive From the United States Government Upon Completed Performance of the Contract, to-wit, the Sum of \$70,725.98.

It is submitted that whether the Appellee had in fact underestimated its costs of production was and is of no consequence in a determination of the measure of damages properly applicable. Its cost of production was obviously the basis upon which it received an award of a contract from the United States Government. Under no circumstances could Appellee have demanded more than \$70,725.98 upon full performance of the contract. If in fact there had been performance under the contract, and if such performance had caused Appellee to incur costs of production in excess of \$66,304.38, this would have been Appellee's loss; it could not have properly complained to the Government respecting its errors in calculation. Nevertheless, it would have been entitled to payment of the sum provided to be paid under the contract. By the same token, these matters were of no concern to the Appellant. The cost of the goods which Appellant had agreed to deliver was fixed; it was only one item of costs which Appellee considered in its negotiations with the United States Government. Its failure and refusal to deliver the goods which it was obligated to deliver made it impossible for the Appellee to perform under its contract with the Government. The Appellant well knew

that these goods were being purchased for use in a resale contract; the record is filled with admissions of such knowledge. [T. R. pp. 449, 544, 554-555, 562-563, 623-624, 627, 356, 376-377, 296, 672-673.]

It was thus clearly *within the knowledge and contemplation of the parties* that a breach of the agreement by the Appellant would cause the Appellee to sustain the loss represented by Appellee's inability to perform under the terms of a contract pursuant to which it would have received \$70,725.98. (Emphasis added.)

The rule applied by the Court with respect to damages is applicable only where no such circumstances as were here present were within the contemplation of the parties.

The law is clear in California that profits lost as the direct and natural result of a breach of contract are recoverable as damages.

Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 249;
Beatty v. Oakland Sheet Metal Co., 111 Cal. App.
2d 53, 67;

Morello v. Growers Grape Production Association,
82 Cal. App. 2d 365, 375.

Appellee has set forth in its opening brief authorities in this jurisdiction as well as in other jurisdictions supporting the following proposition:

That where there are special circumstances made known to a seller at or before the making of a contract, from which it might reasonably have been foreseen that non-delivery by the seller will, in turn, cause a breach of

the buyer's contract with a customer, and the two contracts are in fact breached, the damages recoverable from the seller who is in default are the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated.

House Grain Co. v. Finerman, 116 Cal. App. 2d 483, 495, 497;

Patty v. Berryman, *supra*, 95 Cal. App. 2d 159 at p. 171;

Hacker etc. Co. v. Chapman Co., 17 Cal. App. 2d 265, 267-268.

The rationale of these cases is that by reason of the knowledge of special circumstances, the parties are deemed to have contracted on the terms of a seller's being liable if the seller forces the purchaser to a breach of the latter's contract with a customer.

See:

Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85.

Accord:

Booth v. Spuyten Mill Co., 60 N. Y. 487, 494;

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543.

As stated in the leading case of *Mesmore v. New York Shot and Lead Co.*, 40 N. Y. 422, the existence of the knowledge of a contract of resale brings the entire matter into the contemplation of the parties. Thus the case is within the general rule of damages as expressed in Section 3300 of the Civil Code of California.

This Honorable Court has supported this very proposition in the case of *Bercut v. Park Benziger & Co.*, 150 F. 2d 731, 733, wherein appears the following language:

“In these California decisions the buyer’s loss of profits appears to be regarded as the direct and natural consequences following in the ordinary course of events from the seller’s failure to deliver”

See:

Orester v. Dayton Rubber Manufacturing Co., 228 N. Y. 134, 126 N. E. 510.

Conclusion.

Counsel are humbly confident that upon a reconsideration of the record and briefs, this Honorable Court will grant a rehearing with respect to the issue upon which this Petition is based. The judgment of the Court, if carried to its logical conclusion and application, imposes upon every entrepreneur an unreasonable business risk. It says to such person:

“When you enter into a new business every person with whom you deal may enter into a contract with you with impunity; if such person violates that contract you have no recourse for you have not been in business a sufficient time to have demonstrated your acumen and ability as being at a degree or level that will insure the profitable operation of your business.”

Counsel feel that the Court did not intend such a result. The right to rely upon the performance of contractual duties should be as assured to the fledgling as it is to the aging. The enforceability of contracts should not be a matter of progression.

Appellee thus respectfully prays that this Petition for Rehearing be granted and that this case be reheard *en banc*.

Respectfully submitted,

AARON L. LINCOFF and

GILBERT KLEIN,

By AARON L. LINCOFF,

Attorneys for Petitioning Appellee.

Certificate.

I, Aaron L. Lincoff, one of counsel for the Appellee, Modern-Aire of Hollywood, Inc., a corporation, do hereby certify to this Honorable Court that in my judgment the foregoing Petition for Rehearing is well founded in fact and in law, and that it is not interposed for the purpose of delay.

Dated this 15th day of December, 1955.

AARON L. LINCOFF.

No. 14,497

IN THE

United States Court of Appeals
For the Ninth Circuit

CLEMENTE MARTINEZ PEREZ,
Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, Washington, D. C.,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEE.

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San Francisco 1, California,
Attorneys for Appellee.

FILE

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PAUL P. O'BRIEN, CL

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No. 14,497

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CLEMENTE MARTINEZ PEREZ,
Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States, Washing-
ton, D. C.,
Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF FOR APPELLEE.

STATEMENT.

Appellant was born in the State of Texas and was thereby a citizen of the United States at birth. He departed the United States for Mexico and remained in Mexico to avoid military service in the United States Armed Forces. He also voted in Mexican elections. Under the provisions of the Nationality Act of 1940 as amended 27 September 1944, 8 U.S.C. 801(e) and 801(j), appellant was expatriated.

QUESTION PRESENTED.

The sole question presented by this appeal is the constitutionality of 8 U.S.C. 801(e) and 801(j).

STATUTE.

Title 8 U.S.C. 801 (Section 401 of the Nationality Act of 1940 as amended by the Act of September 27, 1944).

Sec. 801:

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * *

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

* * *

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.”

ARGUMENT.

CONGRESS HAS THE CONSTITUTIONAL POWER TO PROVIDE FOR THE LOSS OF UNITED STATES NATIONALITY BY CITIZENS WHO IN TIME OF WAR VOLUNTARILY REMAIN OUTSIDE THE JURISDICTION OF THE UNITED STATES TO EVADE OR AVOID MILITARY SERVICE.

The Supreme Court of the United States has consistently held that the power to fix the conditions for loss of nationality is an attribute of sovereignty which may be reasonably exercised on the basis of national need. While the particular act upon which expatriation rests must be a voluntary one, the Courts have held that the person voluntarily committing the expatriating act need not, at the time, have the subjective intent to expatriate himself, i.e., to choose another allegiance over that of this country. If he freely does the act which Congress has specified as a basis for loss of nationality, and if that act has reasonably been found by Congress to be a basis for expatriation, then the doing of the act results in loss of his American nationality, whatever the internal feeling of the doer as to his allegiance.

These settled principles establish the constitutionality of Section 401(j). There is a national need for dealing with draft evaders who remain outside the jurisdiction of the United States and thus outside the reach of ordinary criminal sanctions. As early as 1865, Congress provided for forfeiture of the rights of citizenship upon failure of deserters to return to the armed forces, or upon departure of enrolled draftees from their district or from the United States with intent to avoid draft into the armed forces. Act

of March 3, 1865, Sec. 21, 13 Stat. 490. This statute remained in effect until repealed by the Nationality Act of 1940, and was soon reinstated, in effect, by the provision here involved, which was passed in 1944. Such evaders pose a problem in the nation's international relations by retaining rights to treatment as United States citizens in foreign countries at a time when they are unwilling to fulfill the obligations of citizenship. Thus, the prescribing of loss of nationality under the conditions specified in Section 401(j) is a matter of "national moment" within the constitutional powers of Congress (see *Mackenzie v. Hare*, 239 U.S. 299, 312).

A. The power to expatriate is an implied attribute of sovereignty and is not restricted to instances where the citizen desires to give up his American nationality.

Any argument that the Congressional power to expatriate is necessarily hobbled because it is not expressly spelled out in the Constitution was long ago answered by this Court in *Mackenzie v. Hare*, 239 U.S. 299, upholding the validity of the statutory expatriation (34 Stat. 1228, c. 2534) of a native-born woman upon her marrying an alien, even though she had no specific intent to expatriate herself and never left the United States. The Court said (239 U.S. at 311):

"But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and

intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.”

This doctrine of implied powers in the field of foreign relations is, of course, one of long standing and great breadth. See *e.g. United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318. As applied to the power of the United States, as a nation, to fix the conditions which will result in loss of nationality, it has not seriously been questioned since *Mackenzie*. It was assumed in *Savorgnan v. United States*, 338 U.S. 491, in which the Court upheld the statutory expatriation of a native-born citizen as against her contention that she did not intend to renounce her citizenship by obtaining Italian citizenship while in the United States and then residing abroad. In *Perkins v. Elg*, 307 U.S. 325, the Court, in sustaining a claim of retention of citizenship, recognized the power to expatriate, stating (307 U.S. at 329):

“Citizenship (at birth) must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.”

See, also, *Kawakita v. United States*, 343 U.S. 717, 722-731; *Mandoli v. Acheson*, 344 U.S. 133.

The lower Courts have taken the same view of the inherent power to expatriate. *Lapides v. Clark*, 176 F.2d 619 (C.A.D.C.), certiorari denied, 338 U.S. 860, upheld, as a basis for expatriation, five years resi-

dence in a foreign state by a naturalized citizen of the United States. There are numerous decisions upholding the loss of nationality by voting in a foreign country. E.g., *Acheson v. Wohlmuth*, 196 F.2d 866, 871 (C.A.D.C.), certiorari denied, 344 U.S. 833; *Acheson v. Mariko Kuniyuki*, 189 F.2d 741, 744 (C.A. 9), 190 F.2d 897, certiorari denied, 342 U.S. 942; *Miranda v. Clark*, 180 F.2d 257, 259 (C.A. 9) (in which a minor's vote was held to expatriate, and the Court stated that the statutory provisions "bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation"); *Scavone v. Acheson*, 103 F. Supp. 59, 61 (S.D.N.Y.) (in which the citizen, as here, spent most of her life in a "tiny rural area" with "little schooling" but was nevertheless subjected to the consequence of her act in voting in a single election); *Kasumi Nakashima v. Acheson*, 98 F. Supp. 11, 12 (S.D. Cal.). *Revedin v. Acheson*, 194 F.2d 482 (C.A. 2), certiorari denied, 344 U.S. 820, like *Savorgnan, supra*, upheld the expatriation of an American woman who acquired Italian nationality (without intending to lose her American citizenship).

In the course of our development, the *right* of the individual to renounce his nationality as initially emphasized because we are a nation of immigrants and our chief interest, in the first part of the 19th century, was to secure from other countries recognition of the single status of our naturalized citizens as Americans, freed from all legal ties, duties, or allegiance to the states of their original citizenship.

See *Savorgnan v. United States*, 338 U.S. 491, 497-499; *Mandoli v. Acheson*, 344 U.S. 133, 135-6.

But Congress has also been increasingly concerned with the other side of the coin—with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they should no longer be citizens of this country even if they desire to remain such. During the Civil War Congress forfeited the “rights of citizenship” of deserters and draft-evaders, and in the Citizenship Act of 1907, 34 Stat. 1228, Congress enacted general legislation imposing expatriation on Americans who perform various types of acts. From 1940 to 1952, the expatriation provisions were set forth in Section 401 of the Nationality Act of 1940; since December 1952, the controlling provisions have been those of Sections 349-357 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1481-1489.

In applying and sustaining these provisions for compulsory expatriation, the Courts have established that the power of Congress is not restricted merely to recognizing the intention of the citizen to renounce his American nationality. Most of the acts specified by Congress for expatriation are objective, and it is immaterial that the person may desire and intend to retain his citizenship in this country. As noted above in the case of *Mackenzie v. Hare*, 239 U.S. 299, the Court held that a woman lost United States nationality by marriage to a foreigner even though she did not intend to renounce her citizenship. The loss of citizenship was the result of her voluntary act in

marrying the alien. As the Court said, 239 U.S. at 312, her act was “as voluntary and distinctive as expatriation and its consequence must be considered as elected.”

In *Savorgnan v. United States*, 338 U.S. 491, the Court expressly ruled that the subjective intent of the citizen not to lose United States nationality could not overcome the effect of her voluntary action in acquiring Italian nationality. It characterized the expatriating act as objective (338 U.S. at 497, 499) and declared, at p. 500:

“There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.”

And in a footnote the Court further observed (338 U.S. at 501):

“In section 401 of the Act of 1940, Congress added a number of per se acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. * * *

In *Kawakita v. United States*, 343 U.S. 717, 721-730, the Court and both parties assumed that Kawakita

would have been expatriated if he had committed one of the statutory acts of expatriation, regardless of the jury's finding that he never intended to renounce American citizenship. Similarly, in *Mandoli v. Acheson*, 344 U.S. 133, it was immaterial whether Mandoli thought he was an American or an Italian.

In the earlier lower Court case of *Ex parte Griffin*, 237 Fed. 445, 453 (N.D.N.Y.), it was said: "If it be the natural and inherent right of a citizen to expatriate himself or herself, it would seem that the government should have the right to declare that the doing of acts by the citizen which are inconsistent with the discharge of his duties as such citizen to his government, accompanied by a departure from its jurisdiction, constitute expatriation—abandonment and renunciation of citizenship." See also *Revedin v. Acheson*, 194 F.2d 482, 484 (C.A. 2), certiorari denied, 344 U.S. 820 wherein the Court stated "She cannot escape their (the provisions) effect merely because she did not intend to be bound by them or because she kept herself insulated from the significance of free and conscious acts for which she must be held responsible"; and *Acheson v. Wohlmuth*, 196 F.2d 866, 871, (C.A.D.C.), certiorari denied, 344 U.S. 833 "A person cannot avoid the consequences which Congress has attached to his overt acts by claiming ignorance of the law or a contrary intention on his own part * * *." The other cases cited supra have also upheld the loss of nationality by the doing of specified acts, regardless of the subjective purpose or intent of the citizen.

The only authority cited by appellant relative to the question is the ruling of Judge McLaughlin in the District Court for the District of Hawaii in the cases of *Kiyokuro Okimura v. Acheson*, 111 F. Supp. 303 and *Hisao Murata v. Acheson*, 111 F. Supp. 306. The prior decisions of Judge McLaughlin in the cases, *Okimura v. Acheson*, 99 F. Supp. 587, and *Murata v. Acheson*, 99 F. Supp. 591, were appealed to the Supreme Court, and remanded (342 U.S. 899, 900) for findings as to the circumstances under which the claimed citizens had performed their services in the Japanese army or voted in Japanese elections. Upon the remand the judge, while finding no "legal duress", made clear findings of outright compulsion, 111 F. Supp. 303-306. Since these findings of coercion were entirely comparable to findings made in a large number of other Japanese-American expatriation cases in Hawaii and the federal District Courts on the West Coast which the government had not appealed, the government sought no review of the ultimate holding in these two Hawaii cases that American citizenship had not been lost. Similarly, in the other cases in which Judge McLaughlin has invalidated provisions of Section 401, the government has not appealed to this Court because (a) in each instance the record or findings revealed duress or coercion or some other infirmity of the type which has led the other district judges trying this class of Japanese-American expatriation case to hold — without invalidating the statute — that expatriation did not occur; and (b) the Ninth Circuit, which includes the District of Hawaii,

has already sustained the validity of these provisions of the statute. See *Miranda v. Clark*, 180 F.2d 257, 259; *Acheson v. Mariko Kuniyuki*, 189 F.2d 741, 744, certiorari denied, 342 U.S. 942; opinion in the instant case, R. 36; *Vidales v. Brownell*, 217 F.2d 136, 138.

B. A statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality.

While the decisions discussed above make clear that Congress has the power to fix the conditions for loss of nationality regardless of the intent of the individual to renounce or give up his citizenship, it is plain that this power cannot be exercised arbitrarily or unreasonably. What are the considerations which must govern such action by Congress?

From the decisions of the Courts Congress is not limited to conditioning the loss of nationality only upon acts which evince the actual acceptance of some other nationality, such as naturalization in a foreign state. The Courts in upholding the statutes have spoken not in terms of the citizen's acceptance of some other nationality, but of the sovereign national need to determine questions which affect its international relations and its citizenship.

Mackenzie v. Hare, 239 U.S. 299;

Lapides v. Clark, 176 F.2d 619 (C.A.D.C.),
cert. den. 338 U.S. 860.

Lack of allegiance to or support of this country (whether or not preference for another nation is exhibited) is a significant factor, as are acts and situ-

tions which may lead to international embarrassment or embroilment. A statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality. A citizen has obligations and responsibilities as well as rights and privileges. The problem of draft evaders who remain out of the country in a period of war or national emergency in order to avoid a fundamental obligation of citizenship—service in defense of the nation—is manifestly a serious one. Not only do they place themselves out of the reach of ordinary criminal sanctions which apply to draft evaders within the country, but present a problem in international relations, so far as other countries are concerned, not to mention so far as this nation is concerned, in their refusal to fulfill the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of this type. In 1865, even before the “right” to change nationality was spelled out in the Act of 1868, Congress provided for forfeiture of the “right of citizenship” of deserters and enrolled draftees who departed from their district or from the United States with intent to avoid draft into the armed forces. Section 21 of the Act of March 3, 1865, 13 Stat. 490. This statute apparently decreed loss of citizenship even if the evader did not leave the jurisdiction of the United States.

The constitutionality of this 1865 Act was squarely and extensively considered and its validity upheld in

Gotcheus v. Matheson, 58 Barb. 152, 155-160 (reversed on other grounds, 61 N. Y. 420), the Court relying upon the constitutional powers of Congress with respect to the armed forces (Const. Art. I, section 8, subds. 11 and 13). The validity of the Act and its effectiveness as an expatriation statute was assumed in utterances of this Court, of other Courts, of Attorneys General, and of other administrative officials, dealing with questions under this legislation. See III Hackworth, *Digest of International Law* (1942), pp. 276-279; *Kurtz v. Moffitt*, 115 U.S. 487, 501 (in which the effectiveness of the forfeiture of citizenship of deserters was held dependent, apparently, only upon a court-martial's finding of the fact of desertion); *In re Carver*, 142 Fed. 623, 624 (C.C.D. Me.); *United States v. Snow*, 27 Fed. Cas. (No. 16,350) 1255, 1256 (E.D. Tenn.); *Cavender v. United States*, 8 C. Cls. 281, 282; *Citizenship of Grover Cleveland Bergdoll*, 39 Op. A.G. 303; *Holt v. Holt*, 59 Me. 464, 465-466; *Severance v. Healey*, 50 N.H. 448, 451; *McCafferty v. Guyer*, 59 Pa. 109, 110, 113, 119, 123; *Huber v. Reily*, 53 Pa. 112, 119. The rationale of the legislation has been stated in *State v. Symonds*, 57 Me. 148, 150:

“The object of the section in question is to prevent the offense of desertion by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting

the army in a death-struggle of the government for the preservation of its nationality.”

This 1865 statute was amended in 1912 to make it inapplicable in times of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172). Thus, the statute involved here (Section 401 (j)) had behind it the support of many years of history. When it was enacted in 1944, conditions incident to World War II revealed a special need to reinstate the provision for draft-evaders. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill which became Section 401 (j), spells out the circumstances, at pp. 1-2:

“It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.”

Conscientious scruples aside, readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of American citizenship. As monuments throughout the land attest, the country's demand upon the citizen-soldier has been deemed the highest call to duty. When the draft-

evader adds lurking abroad to his wilful repudiation of this obligation, he cannot challenge Congress' dissolution of the ties of allegiance between him and the nation. For not only has he rejected his highest duty of citizenship and kept himself beyond the reach of the American criminal sanctions designed to compel him to fulfill that duty; he is also, in effect, choosing whatever protection he may obtain from another country, as against the protection of the United States and its correlative obligations. Repudiation of the citizen's duty to help preserve the nation in time of war has traditionally been regarded as cause for severing the cords of allegiance.

CONCLUSION.

For these reasons it is respectfully submitted that the judgment of the Court below be affirmed.

Dated, San Francisco, California,

April 20, 1956.

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No. 14,499

IN THE
United States Court of Appeals
For the Ninth Circuit

PAUL E. PLESHA, JAMES E. MABBUTT
and MYRON L. KERN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

APPELLANTS' OPENING BRIEF.

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No. 14,499

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PAUL E. PLESHA, JAMES E. MABBUTT
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Appellants,

VS.

UNITED STATES OF AMERICA,

Respondent.

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

APPELLANTS' OPENING BRIEF.

I. THE FACTS.

There is no conflict in the evidence and no dispute as to the facts. A narrative of the essential facts follows.

Plaintiff Paul E. Plesha and Plaintiffs in Intervention James E. Mabbutt and Myron L. Kearns, hereinafter referred to as "plaintiffs" or as "appellants" or as "Plesha" "Mabbutt" and "Kern", are residents of the Northern District of California. This is alleged in the complaints (Tr. pp. 3, 29, 32), admitted in the answers (Tr. pp. 7, 97, 104), and found by the

Court (Finding 29, Tr. pp. 138-139). Each of them entered the Armed Forces of the United States in 1941 and served therein during World War II. (See Answers, Tr. pp. 9, 99, 106; Findings 1, 8 and 14, Tr. pp. 126, 129, 131.) While in the service each insured his life under the National Service Life Insurance Act of 1940. (Public No. 801, 76th Congress, Title VI, 54 Stat. 1008, 38 U.S.C.A. Secs. 801-818.) This also is established by the pleadings. (Tr. pp. 3, 7, 29, 97, 32, 104.)

Before entering the service each had obtained life insurance from California Western States Life Insurance Company. (Answers, Tr. pp. 9, 99, 106; Findings 1, 8 and 14, Tr. pp. 126, 129, 132.) Under these policies there was no personal liability to pay premiums (Exhibits 14, 15, 16 and 17, Tr. pp. 275-287; testimony of Marcus Gunn, Tr. pp. 219-222) or to repay policy loans (same Exhibits, Tr. pp. 275-287; testimony of Marcus Gunn pp. 224-225; Finding 22, Tr. pp. 135-136). After entering the Army, each made application to bring such insurance under the protection of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Public No. 861, 76th Congress, 54 Stat. 1183-1186) and these applications were accepted by the United States, Plesha's and Mabbutt's in 1941 and Kern's in January, 1942. (Answers, Tr. pp. 9, 99, 106-107; Findings 1, 8 and 14, Tr. pp. 126, 129-130, 131-132.)

Appellants did not thereafter pay the premiums on such insurance but by reason of being under the protection of said Civil Relief Act, their policies did not

lapse. Instead, the insurance company reported to the United States, as they became past due, the premiums on each protected policy. These reports were made on so-called "Monthly Difference Reports", following receipt of which the United States issued interest-bearing certificates to the company promising payment of the "difference" shown on such reports. (Testimony of Glenn E. Drummond, Tr. pp. 186-196, 234-236; Exhibits 6 and 13, Tr. pp. 261-267, 274.)

Following amendment of Article IV in 1942 (Public Law 732, 77th Congress, 56 Stat. 773-776, effective October 6, 1942) the insurance company, as was its right under Section 408(2) (50 U.S.C.A. App. Sec. 548(2)) of such amendments, elected to give up the certificates which had been issued to it, and the "Monthly Difference" reporting system, and to accept in lieu thereof the method of settlement and the guarantee of premiums prescribed by such amendments. (Tr. pp. 187-188, 196-197; Finding 20, Tr. p. 135.)

Appellants were not consulted concerning such election, nor were they then advised of it, nor did they then consent to any change in the relationship between themselves, the company and the United States. (Request for Admissions 4 and 5 and Replies thereto, Tr. pp. 35-36, 38; Finding 27, Tr. p. 137.)

After appellants were separated from service the United States sent each of them a form letter (FL 9-63) advising that his policy could be withdrawn from protection and stating that if he did not pay the premiums which had accrued during the period of pro-

tection he would owe the United States whatever the United States might pay the insurer. The letter to Plesha was sent about 13 months after his separation, the letter to Mabbutt about 12 months after his separation, and the letter to Kern about 4 months after his separation. (Exhibit A, Tr. pp. 287-289, Exhibits G and H, not in printed transcript; Answers, Tr. pp. 10, 100; Finding 2, Tr. pp. 126-127.) Plesha and Kern took no action on receipt of such letters. Mabbutt wrote to the Veterans Administration requesting termination of protection and this was accomplished some 14 months after his separation. (Answers, Tr. pp. 10, 100, 107; Findings 3, 9, 10 and 14, Tr. pp. 127, 130, 131, 132.)

Each appellant allowed his insurance with California Western States Life Insurance Company to lapse, and in due course the United States was called upon to make good on its promise to pay the premiums which had come due during the period of protection, together with 6% compound interest thereon, and it did so. The amount so paid on account of Plesha's policy was \$261.05, on account of Mabbutt's \$205.75, and on account of Kern's \$332.06. (Answers, Tr. pp. 10-11, 100-101, 107-108; Findings 3, 9, 13, and 15, Tr. pp. 127, 130, 131, 133.) Thereafter the United States demanded of each appellant that he repay to it the amount it had paid the insurance company. Plesha made partial payment in the amount of \$40.00 and Kern paid \$30.00 in accordance with such demand. Mabbutt made no payment. (Answers, Tr. pp. 11-12, 101, 108; Exhibit B, Tr. pp. 297-304; Findings 4, 10, 16 and 17, Tr. pp. 127, 128, 130-131, 133-134.) In 1950

dividends became payable to appellants on their National Service Life Insurance. (Answers, Tr. pp. 7-8, 97-98, 105; Findings 5, 11 and 19, Tr. pp. 128, 131, 134.) The United States deducted therefrom the amounts it had paid to the insurance company, and paid the balance of such dividends by check. (Plesha thus received \$12.70, Mabbutt \$146.25, and Kern \$93.94. Answers, Tr. pp. 9, 99, 106; Findings 5, 6, 12, 19 and 21, Tr. pp. 128-129, 131, 134-135.)

Appellants then brought suit for the balance of their dividends under Section 617 of the National Service Life Insurance Act of 1940 (38 U.S.C.A. § 817), alleging claim therefor, partial denial thereof, and disagreement as to the difference. Plesha sued for \$221.05, Mabbutt for \$205.75 and Kern for \$302.06, with interest thereon from the dates the deductions were made. (Complaints, Tr. pp. 3-6, 28-34.) The United States answered, denying jurisdiction, and claiming on the merits that it had paid the dividends in full, partly by offsetting the alleged obligation to reimburse and partly in cash. As indicated above, the facts pertaining to this defense of payment are set forth in some detail. (Answers, Tr. pp. 6-13, 96-109.)

II. STATEMENT OF THE CASE; THE ISSUES INVOLVED.

The trial Court denied appellants' claims for the balance of dividends due them on their policies of National Service Life Insurance. The denial of such claims was based on a conclusion that each appellant owed the United States the amount which had been

deducted from his dividend. This conclusion, in turn, was rested on the fact that the United States had been required to pay the amounts in question to an insurance company in accordance with obligations assumed by the United States under Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940 (Public No. 861, 76th Congress 54 Stat. 1183, 50 U.S.C.A. App. Sec.s 540-554) in connection with the protection of life insurance issued to appellants by such company, and on the holding that appellants are obligated to reimburse the United States for such payments. The Court also held that the United States was entitled to offset the debt thus found to exist against the National Service Life Insurance dividends.

More specifically the decision below raises the following questions:

1. Does the Court have jurisdiction?
2. As stated by the trial Court: "The central question of this litigation is whether the Relief Act of 1940, as originally enacted, imposed on service men who put their private life insurance policies under the protection of That Act, a liability to repay the defendant for whatever the latter might have to disburse to the insurance companies under that statute." (Tr. p. 116.)
3. If such a liability was imposed, what was the measure of that liability: To reimburse the United States for the amount it would have paid on account of the protection of the particular policy if the United States had settled with the insurance company in accordance with the terms of the 1940 Act; or to

repay the greater amount which the Government actually paid the company in accordance with the terms of the 1942 amendments?

4. Did the 1942 amendments to said Act extend the period of protection of policies placed under protection before the enactment of such amendments?

5. Assuming that the 1940 Act imposed on each appellant the obligation to reimburse the Government for the amount which it might pay on account of the protection of his policy in accordance with the terms of that Act, could the 1942 Congress, without violating the Fifth Amendment to the Constitution of the United States, increase the burden of that obligation without his consent by increasing the amount which the Government would pay to the insurance company and requiring him to reimburse the Government for such larger payment?

6. Was the United States entitled to collect, by way of offset against appellants' National Service Life Insurance dividends, the amounts it did deduct from such dividends?

Many other questions, subordinate to the above, will appear as the analysis of the case develops.

III. SPECIFICATION OF ERRORS.

The answers, express or implied, of the Trial Court to the questions just stated were as follows:

1. It had jurisdiction.
2. The liability was imposed.

3. The measure of the liability was the amount the Government actually paid the company.

4. (Impliedly) The 1942 amendments extended the period of protection for previously protected insureds.

5. (Impliedly) There was no violation of appellants' rights under the Constitution.

6. The United States was entitled to offset in the amounts deducted.

This appeal challenges each of these holdings, excepting the one relating to jurisdiction, and we assign as error the conclusions reached on Questions 2 to 6, inclusive.

IV. JURISDICTION OF THE COURT.

Appellants' complaints rely for jurisdiction on Section 617 of the National Service Life Insurance Act of 1940, as amended (38 U.S.C.A. Sec. 817). This section, and pertinent portions of 38 U.S.C.A. 445, to which it refers, are set forth in Appendix A. Read together the two sections give jurisdiction to hear suits on any claim under the Act provided there be "disagreement as to claim, including claim for refund of premiums, under a contract of insurance". The term "claim" is defined to include any writing which shows "an intention to claim insurance benefits", and the term "disagreement" means a denial of the claim by the Administrator or someone acting in his behalf. Jurisdiction runs to the District Court in the district in which any claimant resides.

The Court below held that it had jurisdiction. In accord is *Morton v. United States*, 113 F. Supp. 496. Contra on the question of what is included within the term "insurance benefits" as used in Section 445, but distinguishable here, is *Candell v. United States*, 189 F. (2d) 442.

We will not attempt to add to the trial Court's discussion of the *Candell* case and the meaning of the term "insurance benefits" (123 F. Supp. at 595-596; Tr. pp. 112-116). However, we do wish to point out that, in addition to the "insurance benefits" clause, Section 445 contains other language which confers jurisdiction to hear this type of suit. The opening language of the Section is:

"In event of disagreement as to claim, *including claim for refund of premiums . . .*" (emphasis added)

As pointed out by the Court in the *Candell* case (189 F(2d) at 444), payment of a dividend on a life insurance policy is a return of premium or a refund of the unearned portion of premiums previously paid. Therefore, appellants' claims for these dividends were claims for refund of premiums, and it is unnecessary to decide whether or not a dividend is an "insurance benefit".

When the Government paid only part of the dividend in cash and exercised its claimed right of offset against the balance, it denied the claim as to such balance, thus creating a "disagreement". That payment of part of what is claimed is a denial as to the balance is established by the case of *Biven v. United States*,

142 F. (2d) 570, where payment of a lesser amount of insurance than was claimed was held to constitute a "disagreement".

Hormel v. United States, 123 F. Supp. 806, found jurisdiction to hear a similar suit for the balance of National Service Life Insurance dividends in 28 U.S.C.A. Section 1346. While jurisdiction is here founded on a different statute, this observation of the Court is as pertinent here as there:

"... Further, the Government's construction as applied to this case raises the serious question whether the Fifth Amendment would not invalidate a law which would permit the Government to recover a judgment against a citizen without giving him an opportunity to challenge the bare assertion of an administrative officer that money was due and owing." (123 F. Supp. at 810.)

V. ANALYSIS AND ARGUMENT.

The judgment here attacked is one of five which have considered the "central question" stated above. In accord, and cited by the trial Court are *United States v. Nichols* (D.C.N.D. Iowa), 105 F. Supp. 543, and *Morton v. United States* (D.C.E.D. N.Y.), 113 F. Supp. 496. So far as can be ascertained neither of these two cases considered Questions 3, 4, 5 or 6, as listed above.

Contra, and fully supporting our analysis of the 1940 Act, is *Hormel v. United States* (D.C.S.D. N.Y.), 123 F. Supp. 806. Also contra, but giving different

reasons for declining to follow *Nichols*, is *United States v. Hendler* (D.C.D. Colo.), 123 F. Supp. 383.

A. SUMMARY OF APPELLANTS' POSITION.

The Civil Relief Act of 1940 did not expressly impose the liability in question, nor can such a liability be implied from the provisions of that Act. Our position in this regard has been summarized by Judge Dimock in the *Hormel* case:

“... Since there is nothing expressed in the statute permitting any recovery by the Government against those insured, any right of recovery must be based on implication. Any implication of the right to such recovery must be grounded upon the position of the Government as a guarantor who has made good upon its guarantee. In such case, the guarantor is entitled to recover over from the principal obligor the amount which the guarantor has been required to pay. Here, however, as plaintiffs point out, there is no way of determining under the provisions of the 1940 Act how much of the total which the Government is required to pay is payable for the account of any particular one of those insured. This seems to me to establish plaintiff's position that these insured are under no obligation to reimburse the Government in the amount sought or in any other amount.

“The fact that Congress omitted to provide a plan under which the amount of any recovery from the insured might be computed demonstrates that Congress did not intend that there should be any recovery from the insured.

“The structure of the 1940 Act does not provide for payments by the Government in satisfaction of the premium liability of each insured but rather a lump sum payment to the insurer. This is not a merely verbal difference. The lump sum settlement provided for is an amount which differs from the total that would be recovered if the Government should succeed in recovering in every case what it here seeks.” (123 F. Supp. at 811-812).

Under the 1942 amendments to the Act the method of settlement between insurance company and Government could be changed at the company's election, increasing the amount the Government could be called on to pay. The Government's attempt to apply this new payment formula as a measure of the insured's "liability" increases that liability beyond the maximum that the 1940 Act could be considered to have imposed. We believe that any such attempt to increase the burden of an obligation without the obligor's consent would be unconstitutional.

So that this Court may weigh the soundness of these conclusions we shall examine in detail the provisions of the 1940 Civil Relief Act, the 1942 amendments thereto, and the Legislative history of both enactments. We shall also find support therefor in the early administrative construction of the 1940 Act.

We believe that the arguments advanced in support of the Government's position are unsound, and we shall attempt to demonstrate their incorrectness.

We shall also give careful attention to the equities of the situation. In this connection we will claim

that the conduct of the United States in the premises has been such as to estop it from asserting the liability it attempts to assert here.

We believe that even if some liability exists, 38 U.S.C.A. § 454a precludes the use of offset here; and further contend that in any event the Government has not sustained the burden of proving how much it has coming from appellants.

B. ANALYSIS OF THE CIVIL RELIEF ACT OF 1940.

1. Summary of Provisions.

The Act is divided into six Articles. Article IV deals with the protection of private-company life insurance. It attempts to preserve the life insurance of men called into the service by prohibiting the lapse or forfeiture of that insurance for nonpayment of premiums. In its effort to preserve property rights despite service-connected inability to meet obligations thereon Article IV is much like the rest of the Act. However, Article IV does differ basically from all of the rest of the Act in its indemnification provisions, obligating the United States to pay if the serviceman does not.

The full text of Article IV is attached as Appendix B. Throughout this brief when we refer to sections of the Act by number we will use the section numbers found in the Act itself (Article IV comprises Sections 400 to 414 inclusive) rather than to the Code where Article IV was 50 U.S.C.A. App. Sections 540 to 554 inclusive.

Article IV provides that any person in military service who had held private-company life insurance for at least thirty days before entering the service could apply for the protection of such insurance having a face value of \$5,000.00 or less. The application was to be sent by the insured to the insurer, and a copy of the application was to be sent to the Veterans' Administration. (§§ 401, 402.) The Veterans' Administration was to approve or reject the application and give notice of its action to the insured and the insurer. (§§ 403, 404.)

No policy which was in force before the insured entered military service and which had been bought within the benefits of Article IV was to "lapse or be forfeited for non-payment of premium during the period of such service or during one year after the expiration of such period" provided that in no event would such protection continue more than one year after the Act itself ceased "to be in force." (§ 405.)

The insurer was to make a monthly report to the Veterans' Administration showing the unpaid premiums which came due during the month covered by the report, payments made during the month on premiums previously listed as being in default, and the difference between the total amount of defaulted premiums therein reported and the payments made on previously reported defaulted premiums. (§ 406.) If any protected insured died while in military service "the amount of any unpaid premiums with interest at the rate provided for in the policy for policy loans shall be deducted from the proceeds of the policy and

shall be included in the next monthly report of the insurer as premiums paid.” (§ 409.) After checking the monthly report the Veterans’ Administration was to issue a certificate to the insurer for the amount of the monthly difference. Such certificate was to bear interest at the rate to be prescribed by the Secretary of the Treasury (the rate later was set at 3%. 38 Code Fed. Reg. 10.3312—old section number from 1941 Supp. to C.F.R.; Finding 23, Tr. p. 136). Insurers were to hold certificates “as security for the payment of the defaulted premiums with interest”. Certificates were to be payable sixty days after approval of a final settlement of account between the Government and the insurer which final statement was to be had “one year after the date when this Act ceases to be in force . . .” (§§ 406, 407, 408, 411).

If the insured did not within one year of the termination of his military service pay to the insurer all past due premiums with interest thereon at the policy loan rate, the policy would lapse and the insurer would become liable to pay the cash surrender value thereof. (§ 410.) One year after the termination of the Act there was to be an account stated between the insurer and the United States, the insurer being credited with the total amount of certificates with accrued interest thereon to the date of the account and the Government being credited with the cash surrender value of each lapsed policy up to but not exceeding the unpaid premiums plus interest thereon at the policy loan rate. The balance in favor of the insurer was to be paid by the Secretary of the Treasury. (§§ 411, 412.)

The following appeared in Section 408:

“ . . . To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained.”

The Veterans' Administration was to prepare forms and regulations and was ordered to notify military personnel of the provisions of Article IV and explain it to them. (§ 401.)

2. Silence of Act on Liability Question.

We have seen that the original Article IV contained a rather elaborate scheme for determining how much the Government was to pay to each insurance company, and that it provided in detail for the time and manner of final settlement of accounts between Government and company. The Act *did not say* that servicemen were to repay the Government for amounts paid by it to insurers. There is no provision like that found in Section 406 of the 1942 amendments. There is no requirement that the insured sign a premium note. There is not one word that tells us how to calculate the amount any one serviceman might have to repay, or that tells us when or how or to whom any such repayment was to be made. The silence of the Act on these matters, especially when contrasted with

the very specific provisions concerning the manner in which the Government's liability was to be computed and paid, leave us wondering how Congress could have intended to impose a liability on the serviceman and yet fail to define that liability better than it did.

3. Operation of the Monthly Difference System.

Significant as this Congressional silence may seem, we do not need to rest our case on what Congress did *not* say. What it *did* say is even more significant. The amount that the Government might eventually be called upon to pay a particular insurer was the *difference* between all credits and debits on a running account covering *all* protected policies of that insurer, plus simple interest at 3% per annum. In other words, the Government's obligation was to be measured by the aggregate experience of groups of policyholders. The mechanics of the system of accounts to be had between insurance companies and the Government were such that items relating to individual insureds became submerged in the group account to an extent that it would have been impossible to determine what the Government had paid on account of any one protected policy. Let us demonstrate why this was so.

When a protected policyholder died during the period of protection the amount of any unpaid premiums plus interest at the policy loan rate (6% compound in the cases of these plaintiffs, and more than 3% throughout the insurance business, Tr. pp. 225-227) was deducted from the proceeds payable to the beneficiary and credited to the favor of the Government on the next Monthly Difference Report. So,

due to the difference between the 3% simple interest which had been accruing on the unpaid premiums and the 6% compound interest which was credited to the Government on the Monthly Difference Report, that credit would be larger than the total amount, including interest, which had been charged against the Government on that policy; *and* on the final accounting between the Government and the insurer the “profit” that the Government had made on each death case would reduce the amount the Government had to pay the insurer to something *less than* the total of unpaid premiums on policies that were allowed to lapse after protection plus 3% simple interest on such premiums.

Likewise, if any insured reinstated his policy by paying the premiums which had accrued during the period of protection the Government would have received a credit for the unpaid premiums plus interest at the policy loan rate (§ 410 of Act; 38 Code Fed. Reg. 10.3313—old Section number, from 1941 Supp. to C.F.R.), and since all companies were charging more than 3% on policy loans, the Government would have profited on each reinstatement.

Still further, if any protected policy, at the time of final settlement, had a cash value which exceeded the unpaid premiums plus 3% interest thereon, the Government would profit because under Section 411 it was entitled to credit out of cash value up to the amount of the unpaid premiums plus interest at the policy loan rate.

A simplified example, illustrating how these factors would affect the Government’s liability, is attached as Appendix C.

4. The Measure of the Obligation to Reimburse.

Assuming for the moment that the 1940 Act did impose on appellants and others in the same position an obligation to reimburse the Government, it seems axiomatic that the measure of the obligation of each insured would be the amount which the Government had laid out on account of the protection of *his* insurance.

In its briefs below the United States did not agree; it claimed that the 1940 Act made each protected insured liable for unpaid premiums plus interest at the policy loan rate. In some places the Government claimed that this liability ran to the insurance company, in others it claimed that the liability ran to the Government. Of course the Act does not *say* that the insured is obligated to repay premiums plus interest at the policy loan rate, nor indicate to whom such obligation runs. Because of the silence of the Act, the Government and the Court below rely on common law theories of subrogation and reimbursement of guarantors to fasten a liability upon appellants and others in like position. But—the limit of the rights of a guarantor to recover from the principal obligor is the amount laid out in his behalf. (See 50 Am. Jur. 760, Subrogation § 119; 50 Am. Jur. 1068, Suretyship § 251.) The Government, forced to rely on an implied obligation to reimburse, cannot claim more than full reimbursement. But that is just what it is trying to do here. It asks appellants for an amount equal to unpaid premiums plus interest at 6% per annum, compounded annually, when the most it could have laid out under the 1940 Act (even without credits

from "profits" realized on death claims, reinstatements, etc.) was unpaid premiums plus 3% simple interest.

The opinion in the *Hormel* case (123 F. Supp. at 814-816) gives examples of how the Government's theory would have worked out in practice. In one example the serviceman would have been obligated to pay the Government where the Government had not been required to pay out a penny on the policy involved!

While Congress *could* have enacted a law expressly providing for results such as the Government contends for, the fact is that it didn't. What is more we find it impossible to believe that Congress *would* have enacted a law where the Government could collect more from each insured than it had laid out on his behalf.

5. Conclusions.

We have demonstrated that:

(1) The amount that the Government would have been required to pay to each insurance company on final settlement would have been a balance struck from a running account covering all protected policies of that insurer;

(2) - Deaths, reinstatements and payments out of cash value would have reduced the total Government payment to the insurer on account of lapsed policies;

(3) The *limit* of any liability imposed on each appellant by the 1940 Act would be the amount laid out on his behalf by the Government;

(4) The *amount* of the liability (if any) of any one serviceman to repay would have been affected by what happened to each of the other protected policies of his insurer; and

(5) It would have been difficult if not impossible to compute the "debt" of any one insured, even assuming a formula for doing so could be supplied where Congress did not supply it.

In the light of these facts is it reasonable to suppose that Congress, anticipating the necessity of settlement between the Government and individual servicemen, would have adopted a statutory scheme where it would be so difficult to determine individual liability, or that it would have failed to supply some formula for determining the amount owed or to specify when or how or to whom the "debt" was to be paid? When we compare the elaborate provisions for settlement between Government and insurance company, the answer seems obvious. The absence of any machinery to effectuate repayment from insureds shows that Congress did not intend and did not contemplate that insureds would be called upon for repayment.

Beyond all this, the Act speaks positively on the matter of what happens if the United States is called upon to pay. In Section 408, "To indemnify it against loss" the United States is given a *lien* on protected policies. This much the Congress required for the protection of the Government—this much *and no more*. Here was the place to require payment if repayment was to be required. The possibility of financial loss to the government was not overlooked—it was here

considered and provided for *to the extent that Congress then desired to provide for it. Expressio unius est exclusio alterius!*

C. ANALYSIS OF THE 1942 AMENDMENTS.

Analysis of the 1942 amendments to the Soldiers' and Sailors' Civil Relief Act throws further light on the intent of Congress in 1940. Such analysis is also necessary to answer the question of whether Congress intended to increase the burdens of any "contract" to repay previously entered into, and whether Congress *did* increase any such burden.

1. Summary of Provisions.

The amendments (56 Stat. 773, 50 U.S.C.A. App. Sec. 540-548) were extensive. Article IV was completely rewritten, and the whole scheme of insurance protection was substantially changed. The text of the amended Article IV is attached as Appendix D. Again we will take section numbers from the Act rather than from the Code.

The amount of protectible insurance was increased to \$10,000.00. (§ 401.) The period of protection was lengthened to extend for two years after the insured left the military service. (§ 403.)

The Government now "guarantees" payment of premiums on each *individual* policy, plus interest *at the policy loan rate*, and will make the guarantee good when the period of protection of that policy ends. (§ 406.)

Policies protected under the original Act continue to be entitled to protection thereunder and the provisions of that Act remain in full force and effect as to all policies where protection was applied for before the amendments (§ 408(1)) but the insurer is given the option of surrendering all certificates issued under the original Act and settling on the basis of individual policies in the mode provided in the amendments. (§ 408(2).) There are now specific provisions that the insured shall be indebted to the Government for amounts paid by it to the insurer, and that the Government may offset such debt from any amount due the insured by the Government. (§ 406.)

2. Increase in Government Payments and in Asserted Liability.

The amount which the United States deducted from the appellants' dividends was the amount which it was required to pay under the 1942 amendments, an amount substantially *greater* than it would have been required to pay under the 1940 payment formula, and an amount substantially greater than the maximum obligation which could be said to have been imposed on appellants by the 1940 Act under the theory of a common law obligation to reimburse the guarantor.

The increase was mainly due to two factors, (1) the increase in the interest rate paid by the Government from 3% simple to interest at the policy loan rate, and (2) the extension of the period of protection from one to two years after termination of service. In addition, substituting the 1942 method of calculation for the 1940 method caused the insureds to lose the benefit of applying the Government's "profit" on certain

policies against the supposed liability of the remaining insureds.

3. Extension of the Period of Protection.

The matter of extending the period of protection and the effects of doing so call for some discussion. In the first place it is doubtful that Congress intended to extend the period for policies already under protection. Section 403 (as amended in 1942) does not by its terms apply to policies already under protection. And Section 408(1) says that policies already protected are still governed by the provisions of the original Act. In the second place, the "extension", if it occurred, was accomplished without the knowledge or consent of plaintiffs and others whose policies were protected before the amendments.

4. Conclusions Inferable From Amendments.

What light the 1942 amendments throw on the intent of Congress in 1940, and whether the 1942 Congress intended to increase any liability imposed by the 1940 Act, are questions so interrelated that they will be here discussed together.

The wording of Section 406 is significant:

"... The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, *as amended*, shall become a debt . . ." (Emphasis added.)

Here is the indebtedness provision which the Government says shows Congressional recognition that a liability to repay was imposed by the 1940 Act. Does it show that? No! The indebtedness provision of the

1942 Act is expressly limited to applications approved under the Act *as amended*. The natural implication from this is that there was no indebtedness on account of applications approved *before* the amendments.

Section 408 seems even more decisive. Its two subdivisions make a basic differentiation between the rights and obligations of insureds who applied for protection before the amendments, and the rights of insurance companies as to such previously protected policies. The provisions of the old Act “remain in full force and effect” so far as the insureds are concerned; but the insurance companies are given the option, *whether or not their insureds agree*, to settle with the Government on the basis of individual policies—a greatly simplified method which has the added advantages of bringing them more interest and quicker payment. It is impossible to reconcile Section 408(1) which says the rights and obligations of the insured are unchanged, with a requirement that the insured pay the Government what it paid the insurance company under the new, increased, 1942 payment formula.

Further, if the Government’s position here is correct it means that the 1942 Congress gave the insurance companies uncontrolled discretion to increase the “liability” of each of their insureds to the Government, and also gave these companies strong inducements to do just that. Is it reasonable to assume that Congress intended to put such power in the hands of these companies with complete disregard for the rights and feelings of the very servicemen it was trying to protect? Or is it more reasonable to assume that

Congress was not concerned with what effect the insurance companies' election would have on individual servicemen because there would be no effect, there being no liability to repay in the first place?

Still further, we feel sure that the 1942 Congress had no idea of going to the men whose policies were already protected and telling them that Congress had modified their contracts, unilaterally and without their consent, increasing the burdens thereof as the price of continued protection. It is unthinkable that Congress would attempt to increase such burdens *without* telling the servicemen involved what had been done and giving them a chance to withdraw.

5. Comparison of Claimed Liability With Maximum Liability Under 1940 Formula.

In an effort to show the difference between using the 1942 formula as the measure of appellants' supposed liability and using each appellant's proportional share of the amount the Government would have paid under the 1940 Act formula we introduced our Exhibits 7, 8, 9, and 10. (Tr. pp. 268-271.) A summary of these exhibits is attached as Appendix E. Due to the various uncertainties involved (e.g. when the final settlement under Section 411 would have taken place; the amount by which the Government's final payment would have been reduced by "profits" from other policies; etc.) it is impossible to establish this difference with exactness. However, by eliminating credits from "profitable" policies from our computations, it may be demonstrated that the difference as to Plesha was *at least* \$57.94, as to Kern \$125.87 and as to Mabbutt \$21.55. This is the difference between the liability

actually claimed by the Government (Column 1 of the Summary) and the maximum amount the Government would have been called upon to pay the insurance company if January 25, 1949, had been the final settlement date and only the one policy had been involved. (Column 4 in the Summary.) January 25, 1949 is used because that was one year after the date set for expiration of the Civil Relief Act under Section 604 of that Act (50 U.S.C.A. App. Sec. 584) and Section 4 of the War Powers Act of 1947 (Pub. Law 239, 80th Congress). If instead we take the difference between the amount here claimed by the Government and the Government's maximum obligation to the company on the particular policy on a date one year after the termination of the insured's military service (Column 3 in the Summary) the difference for Plesha is \$75.18, for Kern \$169.80 and for Mabbutt \$34.69.

Any attempt to take into account the effect on the liability of each appellant of the deaths of protected insureds of California Western States Life Insurance Company (there were eight such deaths, Tr. pp. 228-231; see Exhibit 12, Tr. p. 273), the reinstatements of protected policies of that company (there were 38 such reinstatements, Tr. p. 212; Finding 28, Tr. p. 137), and the application of cash values in excess of unpaid premiums would require the use of an electronic computer.

The uncertainties and difficulties involved in trying to determine how much appellants would have had to pay if liable under the 1940 Act is a further indication that Congress did not intend to impose any liability to repay.

D. LEGISLATIVE HISTORY.

1. General observations.

Where the meaning of a statute may be ascertained by analysis of the language of the statute itself there is no need to resort to extrinsic aids to interpretation, such as legislative history and administrative construction. In such a situation such aids are of little, if any value. See generally 50 Am. Jur. 204-218, Statutes §§ 225-230.

We have shown that this is *not* a case of Congressional *silence*, but a case where the language used in the statute indicates with reasonable certainty that Congress did not intend to require reimbursement. While legislative history and administrative construction are of limited importance in a situation like this, they do not contradict, but rather confirm our position here.

2. The 1918 Act.

During World War I Congress passed a Civil Relief Act (Public No. 103, 65th Congress, 40 Stat. 440) which had insurance protection provisions much like those which appeared in the 1940 Act. Like the 1940 Act, the 1918 Act was silent so far as any obligation of servicemen to repay the Government was concerned, the only specific provision on the subject being Section 409 which contained the identical provisions giving the Government a lien on the policy which were placed in Section 408 of the 1940 Act.

The only pertinent item of legislative history is H. R. Report No. 181, 65th Congress, 1st Session, to

accompany H. R. 6361 (which became the 1918 Civil Relief Act). This report contains this language:

“Just what the Government’s financial burden will be can be little more than a guess, but it is plain that it will not be large.

“In the first place the Government only guarantees the payment of the premiums. If the soldier dies the insurance company will get its premiums out of the policy and the Government’s guaranty will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to *his* rights.” (Emphasis added.)

Note that the Government will be subrogated to the insured’s rights under the policy, not to whatever rights the insurer might have to collect from the insured. This indicates that Congress was looking no further than a partial reduction of the Government’s “financial burden” through realizing on values inhering in the policy itself. The further discussion of the size of the Government’s ultimate liability and the value of “this right of subrogation” which follows immediately after the quoted portion of the report contains no hint that the Government could or would attempt to obtain reimbursement from the servicemen involved.

3. The 1940 Act.

House Report No. 3001 and Senate Report 2109, 76th Congress, 3d Session, state that if the protected serviceman does not pay up the unpaid premiums within one year after separation the policy lapses and

the cash surrender value accrues to the Government to the extent necessary to meet the cost of the premiums which it has guaranteed.

The liability question was not touched on the floor of the Senate. (See Cong. Rec. 12837.) In the House an interchange between Mr. Voorhis and Mr. Arends took place. (Cong. Rec. 13125-13133.) This is mentioned in the *Nichols* case. (105 F. Supp. at 553.) Analysis of what was said discloses that Mr. Voorhis was uncertain as to the meaning of the Act and was asking questions about it, and that Mr. Arends' answer was so inaccurate that it must have confused rather than clarified congressional thinking.

4. The 1942 Act.

Apparently there was considerable dissatisfaction with Article IV of the 1940 Act, for as early as April 16, 1941 the Administrator wrote to the President of the Senate proposing various amendments "to substitute a more workable law". This letter, appended to Senate Report No. 716, 77th Congress, includes the following statement:

"It is believed that the proposed amendment, if enacted, . . . will eliminate the possibility of requiring the government to pay premiums on insurance which the insured does not intend to carry except during his period of active service, and will considerably lessen the administrative cost in carrying out the provisions of the article as now enacted."

Bills to effectuate changes in the Act were introduced in both houses (S. 1372 and H. R. 4546) in

April 1941. The development of the indebtedness provision in S. 1372 is most interesting. Originally it was

“ . . . The amount paid by the United States to the insurer* shall become a debt due to the United States by the insured . . . ”

On May 16, 1941, according to Administrator's Decision No. 742 (Tr. p. 75), the words “on account of applications made subsequent to approval of this Act” were inserted at the point marked with an asterisk.

In October Senate Report No. 716, offering an entirely new draft of Article IV, inserted at the point marked with the asterisk: “ . . . on account of applications approved under the provisions of this Article, as amended.” The difference between the words inserted in May and those inserted in October is purely verbal; there would be no object in adding anything like this to the original bill unless it was intended to limit application of the provision to subsequent applicants.

S. 1372 was passed by the Senate on November 10, 1941, with no further changes in Section 406, which then contained the exact language which ultimately was enacted in October 1942. This November 1941 version of Article IV also included Section 408(1) which kept the 1940 Act in full force and effect as to policies previously protected.

A new bill, H. R. 7029, containing a repayment provision like that adopted by the Senate, was introduced in the House. In the course of hearings thereon

before the Military Affairs Committee, Mr. Breining, the Veterans' Administration Representative, was asked by the Chairman:

“Q. How are the premiums paid on the existing \$5,000? Does the insured pay half and the Government pay half, or does the insured pay all of it?

“A. (by Mr. Breining). The insured is liable for all the premiums of the \$5,000 policy, the Government acting really as a guarantor. However, if there is a default, there would not be any liability for the whole amount in excess of the cash value under the present construction of existing law.” (Hearings before House Military Affairs Committee, May 25, 1942, p. 38.)

Leaving aside for the moment the significance of this statement so far as administrative construction is concerned, we note here that Congress is being told by the top insurance man in the Veterans' Administration that the protected serviceman is not liable to reimburse the Government “under present construction of existing law.”

After these hearings H. R. 7164 was introduced on June 1, 1942 (Cong. Rec. 4785) and was passed by the House on June 18, 1942. (See Cong. Rec. 5363-5372.) This bill had *no provision* making the insured indebted to the Government for amounts paid by the Government to his insurer, although, as seen above, H. R. 7029, on which the hearings were held and S. 1372 *did* have such a provision. This is not inaction, this is not silence. This is the *elimination* of an unwanted provision from a law which would govern

future transactions. The Senate insisted on its version of Article IV, including the indebtedness provision (Cong. Rec. 6707) and the bill went to conference.

After conference, the managers on the part of the House in House Report 2481 stated, *inter alia*:

“Under the House bill, any amounts paid by the United States to an insurer on account of approved applications *do not become a claim* against the owner of the policy. The Senate Amendment (sec. 406) *made* such payments a debt due to the United States and authorized collection by deduction from any future amounts due the insured by the United States. The conference agreement retains the Senate provision.” (Emphasis added.)

The bill agreed upon in conference became law on October 6, 1942.

The 1942 legislative history tells us that the two houses of Congress were in *disagreement* as to whether liability to repay should be imposed with regard to policies already protected thereafter, but were agreed that policies already protected should continue to be governed by the original Article IV. Was the 1942 Congress seriously considering giving “free insurance protection” to subsequent applicants while holding those already protected liable to repay? We think not. Further, and perhaps even more significant, the language added to the original draft of Section 406 and the language at Section 408 (1) seem almost conclusive evidence of an intent to restrict the indebtedness provision to future applicants.

E. ADMINISTRATIVE CONSTRUCTION.

1. Regulations, Forms and Explanation to Armed Forces.

Immediate administrative construction of the Civil Relief Act of 1940 was made necessary by Section 401 which required the Administrator of Veterans Affairs to prescribe regulations, prepare and furnish forms, and "issue through suitable military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions" of Article IV.

The original Regulations (38 Code Fed. Reg. 10.3300 et seq., 1941 Supplement to the Code of Federal Regulations, pp. 3514-3520; see Answer to Interrogatory No. 4, Tr. p. 17) are silent on the subject of repayment. R. 3310, which paraphrases Section 408 of the Act, and R. 3314, which paraphrases Section 410 of the Act, are about all that can be found which have any direct bearing. There is nothing remotely resembling a statement that the serviceman is under any liability.

The official statement to the Armed Forces (V.A. Insurance Form 385; see Answer to Interrogatory No. 5, Tr. pp. 17-18; Finding 25, Tr. p. 136) under the headings "Indemnity", "Maturity" and "Settlement" paraphrases the Act and emphasizes the fact that the Government looks to the security of the policy for its protection. Again *nothing* is said which gives the slightest hint that the Act imposed any obligation to reimburse.

The prescribed forms (V.A. Insurance Forms 380, Application for Benefits, and 394, Notice of Approval,

copies of which appear in Defendant's Exhibits A, G and H, printed in part, see Tr. pp. 291-293; see also Finding 24, Tr. p. 136) contain positive language as to what consequences would follow if the insured did not pay the premiums within a year after leaving the service. Personal liability is not one of the enumerated consequences. If the responsible officials thought or had any idea, that a personal liability to repay had been imposed by Congress it was their duty to so draft these forms, especially Form 380, as to make clear and certain the Government's right to such reimbursement.

2. Statements of Veterans' Administration Officials.

Shortly after the Act became law, insurance companies and others made inquiries of the Veterans' Administration concerning the very question which concerns us here.

Harold W. Breining, then Assistant Administrator for Insurance and head of the Government's whole insurance program is quoted in the January 31, 1941 issue of the *Eastern Underwriter*, an insurance trade magazine, as follows:

“There is no provision in the Act at this time for collecting from the insured the amount that the premium with interest may exceed the cash surrender value at the time of termination.” (Answers to Interrogatories 7 and 27, Tr. pp. 19, 45-46; Finding 26, Tr. pp. 136-137.)

On February 21, 1941, Mr. H. L. McCoy, then Director of Insurance for the Veterans' Administration, in reply to a question from a Mr. Peters of the Jeffer-

son Standard Life Insurance Company asking whether the protected serviceman could be "embarrassed by the Government" if he let his policy lapse, said this:

"There is no provision in the Act whereby the Government may be reimbursed by the policyholder in the amount paid to the insurer in those cases where there was no cash surrender value or where such value was insufficient to cover the indebtedness." (Answers to Interrogatories 8 and 28, Tr. pp. 19-20, 46-47; Finding 26, Tr. pp. 136-137.)

In the McCoy-Henig correspondence (See answer to Interrogatory No. 29, Tr. pp. 47-48; Finding 26, Tr. pp. 136-137) the question was even more point-blank and the answer was the same, that there was no provision in the Act for collecting from the insured.

When we consider these statements, the Administrator's letter of April 16, 1941 to the President of the Senate, quoted above, and Mr. Breining's statement to the House Committee on Military Affairs, also quoted above; when we look at the forms, regulations, and official statement to the Armed Forces; and when we also consider that not until March 1, 1943 did any Government official do or say anything publicly indicating a view that the Act imposed an obligation to repay; we are irresistibly impelled to the conclusion that the original administrative construction of the Act was that it imposed no such liability. See *United States v. Nichols*, 105 F. Supp. at 555-556.

3. Administrator's Decision No. 513.

Administrator's Decision No. 513, issued March 1, 1943, (Tr. pp. 56-61) does not do much more than state the problem and announce a conclusion. After stating that the Government's voluntary assumption of its "guarantee of premiums . . . was not a contract right and the United States Government received and asked for no consideration for extending the privilege," the Decision announces that "it is believed" that Section 406 of the 1942 amendments

"was merely in cognizance of the original common law right plus the specific provision which permits set-off . . ." (Tr. p. 60).

Why this abrupt reversal of the earlier position of the Veterans' Administration? The Decision offers this hint:

"There exists no question as to any modification of a contract; but in any view the Government's gratuitous assumption of liability conditioned upon the insured's application for the benefits of the Act and the insurer's consent would not constitute such type of agreement as would preclude Congressional action looking toward reasonable safeguarding of the public interest." (Tr. p. 61.)

This seems to say that the already protected insured had no such contractual rights as would prevent Congress from retroactively imposing the liability on him to hold down or eliminate any financial loss to the Government. By parity of reasoning the Administrator was free to reverse his previous interpretation which, it now appeared, was going to cost too much.

4. Administrator's Decision No. 742.

While Decision 513 was not given wide circulation (see answer to our Interrogatory No. 3, Tr. pp. 15-17), its correctness was "seriously questioned" and the Administrator undertook a "careful reexamination" of the question in his Decision No. 742 dated April 1, 1947 (Tr. pp. 62-94).

Since the decisions of District Courts on this question which are adverse to appellants' position, including the decision below, have adopted the approach, the basic reasoning and the conclusion of Decision 742, we will discuss this Decision at length.

The new Decision, unlike the old one, gives a surface appearance of being carefully reasoned. However, analysis shows that pertinent provisions of the Act and its amendments are given no attention, that the change in the Government's liability wrought by the amendments and the effect of that change on the claimed liability of the serviceman are completely disregarded, and that the whole structure of the Decision rests on unsupportable premises.

The key conclusion, reaffirming the idea of a common law right to reimbursement, is expressed as follows:

"Of course, if the insured fails to discharge his obligation to pay the premiums with interest, the Government is required to pay them, but in so doing it is entitled to receive credit to the extent of the cash surrender value of the policy so that the Government is actually out of pocket only that amount which represents an excess of the premiums with interest over the cash-surrender

value. This, and no more, could the insurer actually compel the insured to pay. Hence, the Government pays only to the extent that the insured could be compelled to do so. Under these circumstances, the Government pays, as guarantor, the insured's obligation and, applying principles of law so well established as to be incontrovertible, the Government has the right to be reimbursed by one whose debt it has paid." (Tr. p. 85.)

a. Major Premise—Insured Liable to Insurer.

If in fact the insurance company could not compel the insured to pay the premiums the Government did not pay *his* debt and the conclusion falls with its premise. It is beyond question that there was no personal liability to pay premiums imposed by appellants' policies (Exhibits 14, 15, 16 and 17, Tr. pp. 275-287) or by insurance policies generally (testimony of Marcus Gunn, Tr. pp. 219-222), prior to protection. Did the act of placing a policy under protection make the insured liable to pay premiums when he was not liable before? Yes, says the Administrator. His argument, with our comments interspersed, is as follows:

"The right of the insurer to receive the premium payments is absolute, for the protection was afforded and it must be paid for. The amount that must be paid is fixed: it is the total amount of premiums that fall due during the period of protection plus interest from the several due dates." (Tr. p. 84.)

Comment: *Is the amount fixed? Interest at what rate, and by whom payable? If this refers to what*

the Government must pay, is interest at 3% simple per the 1940 Act, or at the policy loan rate per the 1942 amendments? If this refers to what the insured "must" pay, a conclusion is being used to prove itself.

"The absolute right of the insurer to receive the premium payments necessarily means that someone is obligated to pay them and that the insurer is entitled to look to such person or persons for payment. Primarily, the insurer looks to the insured for payment. That this is so is made plain by the provisions of Section 410 which, in effect, require the insured, within one year after the time when the Act ceases to be in force, to pay all past-due premiums with interest if he desires to continue the insurance." (Tr. p. 84.)

Comment: Section 410 provides that if the insured does not pay past due premiums plus interest within a year of separation, the policy shall lapse. If the insured was to be liable to the insurance company for premium payments, Congress could have said so right here, by requiring the insured to give the company a premium note or by just *saying* that he was thus liable. But, neither Section 410 nor the application forms say anything of the kind. On the contrary, by providing that the consequence of non-payment is lapse of the policy, and failing to list any other consequence, Section 410 "makes it plain" that the insurance company could not compel the insured to pay.

"It is also made plain by the provisions of Section 409, pursuant to which, if the insured dies while in service, the insurer deducts the premiums, with interest, from the proceeds of the insurance." (Tr. pp. 84-85.)

Comment: How so? The word “if” limits the effect of the Section to what is covered by the “if” clause.

“And it is made clear by the Act’s commitment of the cash surrender value (which, in other circumstances, is ordinarily regarded as the insured’s to dispose of as he pleases) to stand for the premiums owing to the insurer.” (Tr. p. 85.)

Comment: How so? That the insured’s rights in his policy are thus specifically curtailed does not mean that the insurer-insured relationship is otherwise modified.

Has the Administrator proved that the insurance company could successfully *compel* the protected insured to pay the past due premiums if he did not voluntarily pay them within a year after separation? *Would this Court so hold in a suit brought by the insurance company?*

b. Minor Premise—United States a Common Law Guarantor.

Having thus “proved” that the insured was indebted to the insurance company for premiums coming due during the period of protection, the next step is the assertion that when the Government pays the insurance company it pays the debt of another and thus occupies the position of a guarantor at common law. With this goes a characterization of the relationship between insured, insurer and Government as that of principal obligor, obligee and guarantor.

We have just demonstrated that the insured had no obligation to the insurance company. This means

that he was not an obligor at all, unless he is obligated directly to the Government and in that event the relationship would be obligor-obligee, not obligor-guarantor.

Whether the position here occupied by the United States should be characterized as that of a guarantor, a surety, a voluntary indemnitor, or as something apart from any of these familiar categories depends on the facts. What are the facts?

Without request by appellants and on its own initiative Congress enacted the Civil Relief Act wherein the United States proposed and offered to make good (we here avoid using conclusion-forming words like "guarantee" or "indemnify") any loss which insurance companies might suffer by complying with the legal prohibition against lapsing contained in the Act. This proposal was not purely philanthropic. The Government was promoting its own interests; it was removing from the minds of men who had just left their families some of their worries about those families, thus enabling them to be better soldiers. (See Section 100 of the 1940 Act.)

Once the Act was passed, the Government's commitment was irrevocably established. The man who entered the service had the *right* to obtain protection on application. Neither the insurance company nor the Government could refuse him, provided only that his *policy* met the requirements established by the Act. The insured applied to the insurance company, *not* to the Government; and approval by the Government, after receipt of a *copy* of the application, was no more than the performance of a ministerial act,

a clerical determination that the policy met such requirements.

It seems to us that these facts establish that the Government was a voluntary indemnitor within the criteria stated in *Howell v. Commissioner of Internal Revenue*, 69 F. 2d 447, 450, cited, and we believe misapplied, in the *Nichols* case. (105 F. Supp. at 556.)

However, in the final analysis what the Government's position was depends on the contract documents—the 1940 Act itself, the Regulations, the application form and the notice of approval. Nowhere in any of these “documents” is the relationship of principal obligor-guarantor spelled out. To the contrary the limited commitment exacted from the insured is delineated with precision, particularly in the document the insured was asked to sign—the application form. The Government asked for and obtained a lien on the policy, nothing more.

Without a premium note, without any kind of express agreement on the part of the insured to stand personally liable, the Government is in the same position as the mortgagee whose note is barred by limitations, the materialman whose mechanics' lien runs against the property not the property owner, and the life insurance company which makes a policy loan on the sole security of the policy. In fact, the whole approach of the 1940 Act is to treat the unpaid premiums as a policy loan on the sole security of the policy.

Before closing off this guarantor versus indemnitor discussion, we would observe that if the Government's

undertaking was that of a gratuitous indemnitor, or anything of that general nature, it can expect no reimbursement for the gratuity; if its undertaking was contractual in nature, as it would have to be for any right of reimbursement to arise, *it is bound by the contract it has made, and it cannot go outside the writings it prepared for help in adding something it failed or forgot to put there.* This is not a situation where a contract can be implied, in fact or in law; we have here an *express* contract carefully delineating terms and conditions, without an ambiguous word or phrase. The most the Government can say is that some things that should have been stated therein were left out, or that the contract is burdensome on the public purse.

c. **Jump From Premise to Conclusion.**

With his premises thus “established” the Administrator jumps to the conclusion that “the Government has the right to be reimbursed by one whose debt it has paid.” This is quite a jump. It completely disregards the fact that the Government’s obligation to insurance companies would be determined by the aggregate experience of company-wide groups of policyholders, not by the individual policy. It also overlooks the fact, demonstrated above, that it would be almost impossible to calculate how much the Government had paid on account of any one insured. It ignores subdivision (1) of Section 408 of the 1942 amendments which says that the rights and obligations of the already protected insured are unchanged; and it treats the change in the Government’s liability

wrought by subdivision (2) of Section 408, as if it were no change at all.

d. "Support" From Other Portions of the Act.

The administrator claims that the conclusion thus drawn is confirmed by other parts of the Act.

"Obviously, the lien provision is inconsistent with an assertion that the Government's obligation relates only to the amount by which the premiums and interest exceed the cash surrender value, for if that were true the lien provision would be utterly meaningless since the res, i.e., the cash value of the policy, to which it attaches, would be extinguished before the Government's obligation matures." (Tr. p. 86.)

Comment: Not so. Section 410 preserves the res for the United States by providing that when the policy lapses "The insurer shall thereupon become liable to pay the cash surrender value thereof, if any . . ."

"So it must be concluded that as to the total amount of the premiums with interest the insured remains the principal obligor and the Government is secondarily liable as guarantor. Hence, there is no basis whatever for an assertion that the insured is the principal obligor for only so much of the total sum as represents the cash surrender value of the policy and that the Government is the principal obligor as to the remainder." (Tr. p. 86; underlining as in Exhibit 18-A.)

Comment: As shown above, the insured is not a principal obligor for anything. True, the insured, by asking for protection authorized the company to apply cash surrender value, but this did not make the

insured a principal obligor, or make him liable to pay premiums, any more than would a policy provision authorizing use of accumulated dividends to pay missed premiums. The authorization to apply cash surrender value was the consideration and *all* of the consideration the insured gave or was asked to give for protection.

“... the fundamental basis of the entire Act is protection of the person in service by temporary moratoria on certain obligations—as contract liabilities, rents, taxes and so forth. As this principle could not apply to insurance premiums payable only voluntarily, the device was adopted of having the Government guarantee such payments upon the insured’s application. In effect, the Government became the collecting agent for the insurers; but it is significant that under no circumstances did the Government undertake to assume any liability or obligation, as such, of any person subject to the provisions and benefits of the Act.” (Tr. pp. 88-89; underlining as in Exhibit 18-A.)

Comment: Yes, the fundamental purpose of the Act, as stated in Section 100 was to provide temporary moratoria. We thoroughly agree that “insurance premiums payable only voluntarily” can’t be reconciled with temporary moratoria on debts. Yes, to avoid subjecting insurance companies to unfair and probably unconstitutional burdens it was necessary for the Government to assure the companies that it would pay the premiums if the insured did not. Period. The rest of the administrator’s argument does not follow. *Did* the Government become “the collecting agent for the

insurers?" That is a *question*, not a reason for an answer. How could it become the agent to collect something that was not owed? *Did* the Government undertake to assume any liability or obligation? That the Government assumed a liability is just about the plainest thing in the Act. Whether it assumed an obligation for which the serviceman was also liable is the question, not a "significant" basis for an inference.

e. Appeal to the Equities.

Turning from the language of the Act, the Administrator seeks to buttress his position by arguing:

"To hold that the insured is not indebted to the Government in such circumstances would produce results so inequitable and falling so unevenly upon those protected under the 1940 Act that the intelligence and sense of fairness of Congress should not be impugned by ascribing to it such an intent unless no other conclusion can be drawn from the language of the Act itself." (Tr. p. 86.)

He then gives several examples of such "uneven" and "inequitable" results: The insured who let his policy lapse after separation would be given free insurance while the insured who died in service paid for his by having the premiums deducted from the proceeds of his policy, and the insured who reinstated would also have to pay the premiums which came due while his policy was protected; the insured whose policy had little or no cash value at the time of protection gets off easier than the insured whose policy had substantial cash value at time of protection; and the insured who obtained protection under the 1940

Act would be unfairly favored over the insured who applied under the 1942 Act. Another "discrimination," suggested in the *Nichols* and *Morton* cases, is that those servicemen who took out National Service Life insurance had to pay premiums on those policies, and that wouldn't be fair if others were given free insurance.

We concede that these considerations, excepting the one involving those protected under the 1942 Act, might have been urged on Congress in 1940 when it was considering the legislation in question. We can only speculate as to what Congressional reaction would have been if they had been urged. There is no evidence that they were urged.

To say that Congress *should* have required such reimbursement because of such considerations is to disregard the *fact* that it did not expressly do so.

To say that Congress *did* so require because of such considerations involves indulgence in a highly unreliable form of inverse reasoning (it should have, therefore it did), which would be justified only if there were *no* indications in the Act itself as to what was intended, and perhaps not then. cf. *United States v. Gilman* 347 U.S. 507, 74 S. Ct. 695, 98 L. ed. 898, discussed at some length below. As we have shown, not only is the silence of Congress on the subject significant in itself, but there are many *positive* indications that Congress did not want to impose the liability in question. Further, with an express contract staring us in the face, there is no basis for adding terms of critical importance by talking about equities.

5. Discussion of the Equities—Including Some Matters Overlooked by the Administrator.

Nothing that we have said above is said with the purpose of avoiding or evading discussion of the equities of this situation. We would like to take a good hard look at the equities right now.

In October, 1940, Congress had just passed the Selective Service Act. Men inducted under that Act could expect to be paid, in the words of the popular song of the time, "Twenty-One Dollars a Day—Once a Month". The Government did not provide allowances for dependents of men in the lower enlisted grades. (The Servicemen's Dependents Allowance Act—Pub. Law 625, 77th Congress—became law June 23, 1942; and by October 1942, the new private was paid \$50 per month.) True, as Decision No. 742 takes pains to point out, the nation was not at war in 1940, but there was more than a possibility that it soon would be. The purpose of the Civil Relief Act as stated in Section 100 thereof was "to provide for, strengthen and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States . . ." Men called to service before Pearl Harbor left peaceful and remunerative pursuits when most of their fellow citizens were still enjoying them. In this and other respects, their sacrifices were greater than those of men called after October 1942.

Decision No. 742 correctly points out that men inducted after October 1942 "faced the possibility of early combat duty." But, where were the pre-Pearl

Harbor soldiers and sailors in 1942? On Bataan, at Midway, on Guadalcanal, in North Africa, on the oceans and the battlefields of the world, buying with their blood and with their lives the time needed to bring to bear the manpower and the industrial power of this country. Their early training and their availability were beyond price. They fought when the going was toughest. They fought the longest. Their greater exposure undoubtedly resulted in a higher percentage of casualties.

The invidious comparison made in Decision No. 742 between pre-Pearl Harbor soldiers and those who began their contribution at a later time is unworthy of the great soldier whose signature appears on that Decision, and is less than completely incredible only when we realize that General Bradley did not write the Decision, but only approved an opinion prepared by his solicitor in support of a position taken by General Bradley's predecessor.

When we compare the pay and family allowance situation in 1940 with that in 1942, we find ample reason for a difference in treatment, ample reason for *maintaining* insurance protection for the dependents of those first called to the colors. Further, by 1942 Congress could see that the obligations it had assumed in the 1940 Act involved large amounts of money and could well decide that it did not want to go any further along those lines. In 1940 Congress could well have thought that any loss to the Government would be small. In fact, the entire "difference" shown on final accounting might be covered by cash values and the

Government's profit factor (the difference between policy loan interest and 3%, plus the other factors discussed above) if the percentage of policies allowed to lapse was not too high. If the 1940 Congress knew anything about the experience under the 1918 Act, where the lapse ratio was very low (see Exhibits L and M, Transcript, pp. 305-313), it had reassurance on that point.

What about the "discrimination" between those who let their policies lapse and the beneficiaries of those who died during protection? At the time of application no applicant knew whether he would survive his tour of duty. If he should die the beneficiary named in his policy was going to get a death benefit that would not have existed without protection. At the time of application he was *told* that that would happen, and in his application he expressly agreed that it should happen. On death there is a fund in existence because of the protection, from which full payment can be made without difficulty. Quite different is the case of the man just out of the service. He has no such fund; he is struggling to re-establish himself as a civilian and very likely needs to watch every penny.

If the recently separated man has the cash to reinstate his protected insurance and thereafter pay premiums thereon, he is substantially better off than the man who does not. Under the circumstances it would seem perfectly fair to require the reinstater to pay back premiums as a price of keeping the policy with its inherent values while allowing the non-reinstater to cut his losses and walk away without further penalty.

And what about the "inequity" of giving "free" insurance to appellants and others like them while requiring premiums from all those who took out National Service Life Insurance? Here again difference of treatment is based on difference of circumstance. Congress could well have considered that the private company insurance taken out by the insured prior to putting on the uniform represented the man's own estimate of what his family then needed, apart from any thought of military service; and that it should be maintained, within the \$5000 limitation, even if he also could take out National Service Life Insurance. Section 402 of the 1940 Act limited protection to policies taken out at least 30 days before entry into military service. Congress apparently considered that this was all the protection the Government needed against the possibility that insurance would be taken out to take advantage of the "free insurance" provisions of the Act.

Why is it unfair for one insured to apply more cash value than does another toward payment of premiums accruing during protection? When making application the man whose policy already had substantial cash value knew just what he was committing.

In all these cases the Government is putting its finger on the fund, forbidding its alienation, and thus protecting itself as far as it could without requiring a *cash* outlay from a man who had just discharged the most substantial and dangerous obligation of citizenship.

There is more to be said about the equities! Appellants and others in like position have been misinformed and misled to such an extent that it would be most unfair to now require them to pay what the Government claims. Appellants had no reason to believe, when they made their applications for protection, that they were assuming a personal liability. The Act did not say that they were liable nor did the regulations nor the official explanation distributed to the Armed Forces. And on the positive side, they had reason to believe that they were *not* assuming any liability. The public statements of Veterans Administration officials to insurance companies undoubtedly were passed on to their insureds in one way or another. But most important of all, and this is really a matter of contract rather than one of equity, the application form (V. A. Ins. Form 380) prescribed by the Administrator and signed by the applicant defined and limited the insured's obligation and the Government's rights in this language:

"In consideration hereof, I hereby consent and agree that the United States shall be protected in the amount of any premiums and interest guaranteed on the above numbered policy in the event of its maturity as a claim, or out of the cash surrender value of the policy, at the expiration of the period of protection under the Act." (See Exhibit A, Tr. p. 293.)

The Administrator did not take the trouble to circulate to the Armed Forces any information about his Decision No. 513 and the change of position which it

represented. (Answer to Interrogatory No. 3, Transcript pp. 15-17.) It was not until 1946 when appellants received the Administrator's Form Letter FL 9-63 that they had *any* warning or notice that they would be asked to reimburse the Government for moneys it might lay out.

If a duty to reimburse was imposed by implication of law, and the Veterans Administration knew about it, and if the Veterans Administration thought appellants might not know about it, the Veterans Administration was obliged by Congressional directive to explain matters to them so that they could make their own decisions as to what to do. Having failed to do this, the United States put itself into a position where it should be estopped to assert this liability. If plaintiffs ever were under a burden imposed by the 1940 Act, that burden should now be borne by defendant as a matter of honor as well as a matter of law.

Another consideration going to the equities is this: The Government's position imputes to Congress an unconscionable intent to exact a profit of thousands of dollars from appellants and others similarly situated. If the 1940 system of accounting had been retained, the Government would have profited on *each* protected policy, whether lapsed, reinstated or matured as a claim, to the extent of the difference between policy loan interest and 3% simple interest. With the right of offset claimed and asserted here there would have been no losses worth mentioning.

We think it much more reasonable to assume that the purpose of Congress in incorporating a profit ele-

ment in the Act was to provide an additional fund, beside cash values, to cushion the effect on Government finances.

In any event, use of this fund, accumulated through operation of the monthly difference system, would have cut the Government's payments and thus reduced the liability of appellants to "reimburse the guarantor." In a very real sense then, if appellants were liable, this was a *trust* fund held by the Government for their benefit; and when the Government gave the fund away by giving the insurance companies the option provided in Section 408 (2) of the 1942 amendments, it acted in a manner most prejudicial to the interests of those whom it had assumed to *protect*, and in a manner most unsuitable to a fiduciary.

The argument that an intention to make a gift of public funds should not be imputed to Congress was developed in the judicial decisions. Accordingly this argument will be discussed with the cases under Heading V. G. 2 b, below.

6. Weight to Be Given to Administrative Construction.

As to the weight to be accorded administrative construction, it is pointed out in the Nichols case that Decisions 513 and 742 were inconsistent with the "equivocal" position previously taken on the question, and therefore neither construction can be considered to be "of controlling significance." 105 F Supp. at 555-556. On this point of non-uniform construction see also *Merritt v. Cameron*, 137 U.S. 542, 11 S. Ct. 174, 34 L. ed 772; *Burnet v. Chicago Portrait Co.*, 285

U.S. 1, 52 S. Ct. 275, 76 L. ed. 587; *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 49 S. Ct. 133, 73 L. ed. 322.

Another rule applicable to administrative construction which is pertinent here is that where *reliance* has been placed on a particular administrative construction so that injury would result if that construction were changed, the construction relied on will be given special weight. See *Sanford v. Commissioner*, 308 U.S. 39, 60 S. Ct. 51, 84 L. ed. 20; *Grand Trunk Western R.R. Co. v. United States*, 252 U.S. 112, 40 S. Ct. 309, 64 L. ed. 484; *United States v. Alabama G. S. R. Co.*, 142 U.S. 615, 12 S. Ct. 306, 35 L. ed. 1134.

7. Administrative Construction of the 1918 Act.

The United States has introduced some evidence (Exhibits K, L and M, Tr. pp. 305-313) concerning losses suffered by the Government under the 1918 Act and concerning some efforts made to obtain reimbursement from individuals involved. Some of the facts are noted in Decision No. 742, and the opinion in the *Nichols* case also refers to the 1918 experience.

Some inaccuracies and omissions in the Decision should be noted. First, it is not true as stated in the Decision that collections were made in "at least 14 such cases." Defendant's Exhibits show that only *ten* individuals were involved. Not mentioned in the Decision but clearly inferable from the Exhibits is the fact that no efforts were made to collect from anyone except these ten men. Exhibit K (not printed) shows that nine of the ten (records concerning the tenth man are for some reason not included) were still

in the service when approached and that military pressures were brought to bear on them. Further, the Government has disclosed only part of the picture while refusing to respond to requests for further information. (See Answers to our Interrogatories 17, 18 and 19, Tr. pp. 24-26.)

It is not correct to say, as did Judge Graven in the *Nichols* case, that "the relatively small loss sustained" in the 1918 operation indicates a construction "that the Government was not to bear the expense of such guaranteed premiums." (105 F. Supp. at 555.) To the contrary, Exhibit M shows that the "relatively small loss" was due to the small lapse ratio (\$19,868.07 of premiums on lapsed policies, out of \$362,399.50 in past due premiums guaranteed—just over 5%), and that less than 3% of the Government's "loss" was recovered by administrative action (\$484.42 out of \$19,868.07).

Whatever else may be said about this fragmentary and "selected" evidence, the important thing here is that there is no showing that this so-called administrative construction was ever brought home to the 1940 Congress so as to have influenced their thinking in the slightest degree. (See Answer to Interrogatory No. 20, Tr. p. 26.)

F. THE CONSTITUTIONALITY OF INCREASING THE AMOUNT OF A LIABILITY.

Assuming liability to repay under the original Act, and that the measure of the liability was to reimburse

the Government for what it might pay an insurance company under the 1940 settlement formula, *could* Congress, without the consent of protected insureds, require them to reimburse the Government for the greater amount which it voluntarily agreed to pay the companies under the 1942 settlement formula?

Here, after all of the imponderables of the situation have been resolved against the serviceman by implying against him the maximum liability that possibly can be implied on any guarantor-reimbursement theory, we come to a question of power. If Congress had the power to increase the liability at all it had the power to increase it to any extent it chose, either for the benefit of the Government or for the benefit of the insurance companies. In this particular case the suggested interpretation of the Act involves *taking the insureds' money and giving it to the insurance companies*.

The mere statement of this proposition brings an immediate reaction: 'This cannot be—surely our citizens are not to that extent at the mercy of their Congress! It brings the further reaction that no elected representative would think of doing such a thing.

But suppose Congress did intend to increase the liability, and suppose that the law it enacted in 1942 did just that. *Is* there anything in the Constitution that prohibits such action?

Article I, Section 10 of the Constitution proscribing "laws impairing the obligations of contracts" prohibits State Legislatures from increasing the burdens

as well as diminishing the efficiency of contracts. *Columbia Railway etc. Co. v. South Carolina* 261 U. S. 236, 251, 43 S. Ct. 306, 310, 67 L. ed. 629, 636. But this does not answer our question; this prohibition is not binding on the Federal Government.

Is it the law then that the United States, when it is a party to express or implied contracts, may unilaterally modify such contracts as it wills, and that the other party or parties to such contracts have nothing to say about it? No!

“When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States v. Bank of Metropolis*, 15 Pet. 377, 392, 10 L. ed. 774, 779, except that the United States cannot be sued without its consent.” *Perry v. United States*, 294 U. S. 330, 352, 55 S. Ct. 432, 435, 79 L. ed. 912, 918.

In *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. ed. 1434, the United States had sought to avoid its obligations under certain war risk insurance policies issued during World War I. The Supreme Court refused to countenance this, observing:

“The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citing cases.) When the United States enters into con-

tract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.” (292 U.S. at 579, 54 S. Ct. at 843, 78 L. ed. at 1440.)

Is it any less offensive to due process to make a new contract or increase the burdens of an existing contract without the consent of the other party than it is to abrogate contract rights? The *Columbia Railway* case, *supra*, firmly said “no” to a fully analogous question under Article I, Section 10.

There is a further answer to our problem to be found in the just compensation clause of the Fifth Amendment. In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 602, 55 S. Ct. 854, 863, 869, 79 L. ed. 1593, 1604, 1611, Mr. Justice Brandeis, speaking for a unanimous Court, said:

“The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor’s personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts . . .

“The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has

taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Is it any less offensive to take from an insured and give to his insurer than it is to take from a mortgagee and give to his mortgagor? The Frazier-Lemke Act had the dubious virtue of taking from the rich and giving to the poor; the Civil Relief Act of 1942, interpreted as the Government would have it, represents an attempt to take from the poor and give to the rich!

We respectfully submit that any attempt by Congress to increase plaintiffs' liability (if any) would be beyond the power of Congress and unconstitutional.

We further submit that it is not necessary for the Court to reach the constitutional question, since there was no liability to be increased.

G. ANALYSIS OF COURT RULINGS ON LIABILITY ISSUE.

1. Decisions Requiring Reimbursement.

An examination of the three cases decided in the Government's favor discloses that the pattern of reasoning follows that in Administrator's Decision No. 742 with some refinements and additions. The principal argument again is this:

The insured by applying for protection was able to keep insurance in force on the strength of the Government's promise to pay if he didn't, and this was a benefit received by him for which he owed the company which had provided the protection. The United States, as guarantor, was required to pay his debts to the company, and under common law principles the United States is entitled to reimbursement. See *United States v. Nichols*, 105 F. Supp. 543 at 556 and 559; *Morton v. United States*, 113 F. Supp. 496 at 500; *Plesha v. United States*, Tr. pp. 116-117.

A second line of argument is that in the absence of a definite Congressional mandate, an intention to make a gift of public funds to a selected group, holders of private life insurance policies, should not be imputed to Congress. Such action would be discriminatory, favoring this group over others equally worthy; and the whole purpose of the Act was to grant temporary moratoria not to permanently relieve servicemen of their obligations. See *Nichols*, 105 F. Supp. at 558, *Morton*, 113 F. Supp. at 500, Tr. pp. 110-111, 118-119. Expressed in its most positive form by the Court below:

“In the absence of a definite Congressional mandate, this Court is not prepared to assist in this latest attempt to siphon off some more of this nation’s fast-ebbing public fisc.” (123 F. Supp. at 597; Tr. p. 119.)

this argument seems to say that as long as Congress didn’t expressly exempt protected insureds from liability to reimburse, such liability *was* imposed, regardless of other factors and regardless of what the Act might otherwise provide.

Two additional arguments are suggested in the *Morton* case:

(1) “Viewing the legislative history in the light of the discussion in the *Nichols* case, it is the present view that the 1942 Act should be construed as a clarification of the 1940 Act rather than as an extension thereof so as to increase or change the obligation of the plaintiff created by his signing Form 380.” (113 F. Supp. at 500.)

(2) “The fact that the plaintiff was advised by the letter referred to in Paragraph 5 of the stipulation of the two year extension arising from the 1942 amendment and took advantage thereof by failure to disclaim anything in that connection, has its place in appraising the impact of the 1942 amendment.” (113 F. Supp. at 500.)

This last refers to the form letters sent on FL 9-63 advising the addressee that he could withdraw his policy from protection and stating that if he let his policy lapse he would owe the United States whatever he might pay the insurer; and it seems to imply that

even if no obligation was created by the 1940 Act, the failure of the insured to disclaim his application when he received this letter caused the obligation to then arise.

Before proceeding to discuss these arguments we wish to point out that certain facts of crucial significance apparently were not argued, considered or even recognized by the parties or by the Court in either *Nichols* or *Morton*. These include the fact the amount sought to be recovered by the Government has no relation to the amount allocable against the particular insured out of the amount payable by the Government to the insurer under the 1940 Act; and the fact that applying the 1942 payment formula as the measure of the insured's "liability", increased that liability beyond the maximum that the 1940 Act could be considered to have imposed. These facts and their various implications offer, in our view, the key to the door marked "Congressional Intent". We urged these considerations on the Court below, but they were dismissed, without discussion, as having no merit. (Tr. p. 123.) That the considerations so dismissed are of real significance in this controversy is demonstrated by the opinion in *Hormel v. United States*, 123 F. Supp. 806, where they form the basis of the decision denying reimbursement to the Government.

Likewise, our Constitutional point apparently was not raised and certainly is not discussed in either the *Nichols* or *Morton* opinion. The opinion below does not discuss the point although it was argued to the Court.

We further note that many aspects of legislative history outlined above are not mentioned in the *Nichols* opinion, the only one of the three which undertakes a detailed discussion of such matters.

2. Refutation of Reasoning of These Decisions.

a. The Common Law Guarantor Argument.

This argument has been analyzed and answered in our discussion of Administrator's Decision No. 742. Briefly, and by way of summary, our answer is this: The argument rests on unsound premises. The major premise that the insured was indebted to the insurance company, is refuted, *inter alia*, by Section 410 of the 1940 Act which makes lapse of the policy the only consequence of failure to pay premiums accrued during protection. The minor premise, that the Government occupies the position of a common law guarantor, is an unwarranted assumption. What the relationship is between insured and Government depends on what the Act provides and on what is said in the documents executed by the parties, particularly the application form. If the insured was not liable to the insurer the Government could not be a guarantor of his debt. The Government asked for and received certain security, the equivalent of a policy loan on the sole security of the policy, and no more; and the Government is bound by the contract which it suggested, prepared and entered into.

Further, the conclusion would not follow from these premises, even if they were sound, for it overlooks the fact that what the Government paid the company

and what it claims from the insured, is more than it would have paid under the original contract; which means that it is claiming more than full reimbursement, something a guarantor is not entitled to.

b. The Gift Argument; the Gilman and Hendler Cases.

There can be no question that Congress *could* grant free insurance or free insurance protection to men in the military service. All men who enter the service now get free insurance during their service under the Servicemen's Indemnity Act of 1951 (38 U.S.C.A. Secs. 851-858). See also 38 U.S.C.A. 802(d), which provided insurance for the beneficiaries of certain men who died or were disabled before applying for National Service Life Insurance.

The argument that intention to make a gift of public funds should not be imputed where Congress did not unequivocally *say* it intended to make a gift, is the counterpart of our argument that the intention to impose a liability on one for whose benefit a statute was enacted should not be imputed to Congress where Congress did not *expressly* impose the liability. This seems to present us with a choice: What foot should we put the shoe on? i.e. what inferences are we going to draw from silence? If the Act really is silent (we say it is not), the choice would have to be based on the Court's assessment of the equities involved.

The Court below apparently considered that *all* of the equities were on the Government's side, because it said (123 F. Supp. at 597; Tr. p. 119) that the intention to make such a gift as this would have to be

expressed to be effective. The Supreme Court of the United States in *United States v. Gilman*, 347 U.S. 507, 74 S. Ct. 695, 98 L. ed. 898 weighed the equities of a substantially similar situation in a very different way. When the weighing process was done, it concluded that in view of the “complex of relationships” involved, Congress, not the Court, should make policy. In the face of Congressional silence a unanimous Court declined to imply a common law right of indemnity against the employee whose negligence had cast liability on the United States (under the Tort Claims Act).

We submit that, at the very least, the *Gilman* case requires a searching examination of the “complex of relationships” between the prospective soldier—employee and his Government as of October 1940—a much more searching examination than the Court below considered allowable. We further submit that such an examination, taking into account the factors discussed under Heading V.E. 5, above, will show that the equities in the soldier’s favor balance and outweigh the equities in favor of imposing the liability.

We think the *Gilman* case stands for something more: That in situations like this it is up to Congress to do what it thinks necessary to protect the public interest, and that where Congress has not spoken courts should not make policy by relying on guesses as to what Congress might have done or should have done. In such a view the equities in the serviceman’s favor would certainly seem to be sufficient to preclude

judicial imposition of a liability such as that asserted here.

These conclusions have been applied to the very question here at issue in *United States v. Hendler*, 123 F. Supp. 383, recently decided by the District Court for the District of Colorado. There the Court, after stating that it would otherwise follow the *Nichols* case, concluded that it could not do so in the face of the *Gilman* case.

It is worth noting that the Court in the *Hendler* case, like the Courts in the *Nichols* and *Morton* cases apparently was not asked to consider and did not consider many of the *positive* indications in the Civil Relief Act of 1940, adverted to above and in the *Hormel* case, that Congress did *not* intend to impose a liability to repay. In this respect, indeed, we have a much stronger case than did the defendant Gilman, for our case is not a case of complete Congressional silence.

c. The Clarification by Amendment Argument.

Section 406 of the amendments does not apply to applications approved before the amendments became effective. By its own terms Section 406 covers "applications approved under the provisions of this article, as amended." Further, Section 408(1) of the 1942 amendments says that no single right or obligation of the previously protected insured was changed; as to him the 1940 provisions remain in full force and effect. Since it does not apply to previous applications, Section 406 of the amendments cannot be

said to clarify anything concerning the meaning of the original Act.

d. The Failure to Disclaim Argument.

Here is something not to be found in Administrator's Decision No. 742. It is clear at the outset that this argument cannot be used against Plaintiff Mabbutt—when he got the letter he terminated protection. What about Plesha and Kern, who did nothing?

The answer is cogently and authoritatively set forth in the *Hormel* case (123 F. Supp. at 817-818). The only thing that we could add is the observation that Plesha and Kern and the others who did not respond to this letter might well have considered that the letter was sent to *them* as the result of a common kind of bureaucratic clerical error—a mistaken assumption that they had applied after October 6, 1942. Or they might have thought that this represented an arbitrary and unwarranted interpretation of the 1940 Act—which it was—that they would challenge at the first opportunity—which they did.

3. Decisions Denying Reimbursement; the Hormel and Hendler Cases.

At various points in this brief we have referred to and quoted from *Hormel v. United States*, 123 F. Supp. 806. We will not repeat those observations here. The *Hendler* case (123 F. Supp. 383) likewise has been discussed above. It does seem appropriate at this point, however, to say again that there *is* authority supporting appellants' position here, authority which accepts and adopts the basic approach to this problem

which we here urge. The *Hormel* and *Hendler* cases are the most recent decisions on "the central question of this litigation". They reach their conclusions despite the previous decisions of competent judges of equal rank. The *Hormel* decision is based on a penetrating analysis of the language and the consequences of the statute it interprets. Both *Hormel* and *Hendler* go into aspects of the problem either not presented or not discussed in the earlier decisions. We submit that the conclusions reached in those two cases are correct and should be followed here.

H. THE OFFSET PROBLEM.

If it be concluded that the Government is entitled to reimbursement, the Government still must prove (1) that it had the right to offset this liability against appellants' National Service Life Insurance dividends, and (2) how much it was entitled to deduct from each appellant's dividend. These matters were not discussed in *Nichols* or in *Morton*. The Court below held that the Government had the right to offset but did not discuss our contention that the Government had not proved how much it was entitled to deduct.

1. The Right of Offset.

For many years Congress has made various veterans' benefits exempt from execution. The history of such legislation is briefly set forth in Administrator's Decision No. 742. In 1935 and again in 1940 this exemption was broadened to prevent collection out of such benefits of most claims that the United States

might have against the veteran. The 1940 legislation on this subject became law on October 17, 1940, the same day the Soldiers' and Sailors' Civil Relief Act of 1940 was approved. This law, Section 454a of Title 38, U.S.C. is quoted at length in Appendix F. It prohibits the collection by set-off or otherwise out of any veterans' benefits, including "dividends . . . or other insurance benefits," of any claim of the United States against the veteran "except amounts due the United States by such beneficiary . . . by reason of over-payment or illegal payments made under such laws relating to veterans, to such beneficiary . . ."

The Government seeks to bring itself within the exception. It cannot claim that there has been any "illegal payment," but it does claim in Administrator's Decision No. 742 that there was an "overpayment" when the Government paid the insurance company.

The Administrator's reasoning consists in quoting from a previous Decision (No. 607) the following:

"It has consistently been held in construing this specific language that anything of value which a veteran secures under color of the laws relating to veterans and to which he is not specifically entitled by such laws is an overpayment within the meaning of the statute . . ." (Tr. p. 92.)

and later observing:

"As said in Administrator's Decision No. 607, if the Government pays a veteran's obligation pursuant to law and the veteran refuses to pay

the debt therefrom arising, he is in a very real sense overpaid and there is an overpayment within the meaning of the exemption statute, *supra*, 38 U.S.C.A. 454(a). Viewed in that light it is clear that the recovery provision of Section 406 is little, if any, more than a recognition of the right which theretofore existed and is a mere clarification of the applicable statutes." (Tr. pp. 93-94.)

Here again it is claimed that Section 406 of the amendments was merely a "clarification" of what the Act had provided all along. The fallacy of such reasoning has been pointed out above. Section 406 by its own terms and by virtue of Section 408(1) does not apply to pre-1942 applicants.

We submit that the fact that Congress found it desirable to include such a provision in the 1942 amendments indicates that there would be no right to offset without a specific provision for it.

We cannot agree that the furnishing of insurance protection was in any sense a "payment" to the insured. The Government did not pay the *insured* anything. While the insurance protection offered by the Civil Relief Act was undoubtedly something "of value" it was something to which the serviceman *was* "specifically entitled" as a matter of right. The right to defer payment of Federal income taxes without interest or penalty was a valuable right conferred by Section 513 of the Civil Relief Act of 1940. The Government "lost" the use of such tax money, and therefore had to borrow more at interest. Was this too an

“overpayment” which would justify later collection of such taxes (or the interest paid by the Government to borrow an equal amount) out of a veteran’s disability pension? Could it be argued, on a parity of reasoning with Administrator’s Decision No. 742, that *any* outstanding obligation owed the United States which had the remotest connection with veterans’ benefits was an “overpayment”? And if this can be done of what use is Section 454a?

Webster’s New International Dictionary (2d ed.) defines “overpay” as follows:

“(verb) to pay too much to or for; to more than pay; to compensate or reward beyond deserts.
(noun) Pay in excess.”

If in some sense the Government’s “guarantee” was a “payment” to the insured, how in the world could it be considered an “overpayment”? In what sense did the Government pay more than it owed, and in what sense did the insured get more than that to which he was entitled?

The trial Court gave two reasons for its approval of the Administrator’s position on this subject. First, long-continued administrative construction is entitled to great weight; and second the Government has the same right to offset as any other creditor and this right is not lightly to be disregarded unless unequivocally curtailed by statute. (Tr. p. 122-123.)

On the first point we would observe that until the right of offset postulated in Decision 742 was actually asserted it could not be challenged, and that as soon

as it was asserted it was challenged, in this and other litigation. While Decision 607 represents construction of a few years standing, it is hardly enough to be persuasive here, particularly when we consider the history, the purpose and the very specific language of 38 U.S.C.A. Sec. 454a.

On the second point, Section 454a does “unequivocally curtail” the Government’s right of offset. That is its purpose. Its history shows that Congress has been forced to make the law more and more plain to restrain executive officers who are ever willing to find reasons for declining to consider themselves bound by this statute.

2. Proof of the Amount of the Deduction.

Has the Government proved it is entitled to deduct any particular amount from plaintiffs’ dividends? If it was entitled to any offset, the burden is on the Government to prove *how much* it was entitled to deduct. 47 Am. Jur. 786, Setoff, Sec. 103.

The point here is simple. If the Government is entitled to any repayment from these plaintiffs, it is entitled to collect on the basis of what they would have been liable for under the system of computation provided under the 1940 Act. Section 408(1) of the 1942 amendments makes it clear that those amendments do not apply to policies already protected so far as the *insured* is concerned. And, as discussed at length above, even without this section it is most doubtful that Congress could have or would have increased the

original liability by applying the computation formula of the 1942 amendments to policies protected under the 1940 Act.

If the Act had not been amended in 1942, the Government, in order to collect anything from these plaintiffs or others in like position, would have had to establish what proportion of the total payment to the insurance company involved was chargeable to each insured. Since the Act was not amended as to policies already under protection, this is just what the Government must do now.

The important thing to note here is that the job of showing what plaintiffs would have been liable for under the 1940 Act formula *has not been done at all*. The Government has offered no proof whatsoever on this point, seemingly being content to rest on the position that what it paid to the insurance company on each individual policy under Section 408(2) of the amendments is what it was entitled to collect from each plaintiff, a position which is completely untenable. Section 408(2) did not apply to plaintiffs, and plaintiffs neither knew of nor consented to the Government's decision to pay the insurance company a larger amount under a different formula.

VI. SUMMARY AND CONCLUSION.

We will summarize our arguments and conclusions in our closing brief.

Dated, Sacramento, California,
February 7, 1955.

Respectfully submitted,

WHITE, HARBER & SCHEI,
Attorneys for Appellants.

(Appendices A, B, C, D, E and F Follow.)

Appendices.

Appendix A

38 U.S.C.A. Section 817:

“In the event of disagreement as to any claim arising under this Act (Sections 801-818, 820-823 of this title), suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title.”

38 U.S.C.A. Section 445:

“In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau (Veterans' Administration) and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia (United States District Court for the District of Columbia) or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled ‘An Act to provide for the bringing of suits against the Government of the United States’, approved March 3, 1887, and section 10 thereof so far as applicable . . .

“The term ‘claim’ as used in this section, means any writing which alleges permanent and total dis-

ability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term 'disagreement' means a denial of the claim by the director (Administrator of Veterans' Affairs) or someone acting in his name on an appeal to the director (Administrator)"

Appendix B

TEXT OF ARTICLE IV OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

Sec. 100. In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

Sec. 400. In this article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or

provides insurance under any policy as defined in this article. (Was 50 U.S.C.A. App., Sec. 540.)

Sec. 401. (1) The benefits of this article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Administrator of Veterans' Affairs. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration.

(2) The Veterans' Administration shall issue through suitable military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions of this article and shall furnish forms to be distributed to those desiring to make application for its benefits. (Was 50 U.S.C.A. App., Sec. 541.)

Sec. 402. The benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were

made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy. (Was 50 U.S.C.A. App., Sec. 542.)

Sec. 403. The Veterans' Administration shall, subject to regulations, which shall be prescribed by the Administrator of Veterans' Affairs, compile and maintain a list of such persons in military service as have made application for the benefits of this article, and shall (1) reject any application for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section 402; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this article. Said Administration shall immediately notify the insurer and the insured in writing of every rejection or approval. (Was 50 U.S.C.A. App., Sec. 543.)

Sec. 404. When one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Vet-

erans' Administration shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said Administration shall immediately notify the insurer and the insured in writing of such selection. (Was 50 U.S.C.A. App., Sec. 544.)

Sec. 405. No policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: Provided, That in no case shall this prohibition extend for more than one year after the date when this Act ceases to be in force. (Was 50 U.S.C.A. App., Sec. 545.)

Sec. 406. Within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the date when this Act ceases to be in force every insurance corporation or association to which application has been made as herein provided, for the benefits of this article, shall render to the Veterans' Administration a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month.

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this article, which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default.

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or someone on his behalf in whole or in part during the preceding calendar month.

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Veterans' Administration has, since the date of such report, rejected an application for the benefits of this article. The final sum so arrived at shall be denominated the monthly difference. (Was 50 U.S.C.A. App., Sec. 546.)

Sec. 407. The Administrator of Veterans' Affairs shall verify the computation of monthly difference reported by each insurer and shall, within ten days thereafter, deliver each month to the proper officer of such insurer, a certificate in the amount of the monthly difference certified in respect of each insurer. Such certificate shall be signed by said Administrator

in the name of the United States, shall be in such form as the Administrator shall determine, shall be payable to the insurer within sixty days after the approval of the statement of account, as provided in section 411 hereof, and shall bear interest at a rate to be prescribed by the Secretary of the Treasury, payable with the principal. Such certificate shall not be transferred except with the approval of said Administrator and shall remain with the insurer until settlement is made in accordance with this article. (Was 50 U.S.C.A. App., Sec. 547.)

Sec. 408. The certificate so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained. (Was 50 U.S.C.A. App., Sec. 548.)

Sec. 409. In the event that the military service of any person being the holder of a policy receiving the benefits of this article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the

insurer as premiums paid. (Was 50 U.S.C.A. App., Sec. 549.)

Sec. 410. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: Provided, That if the insured is in the military service when this Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after the date when this Act ceases to be in force. (Was 50 U.S.C.A. App., Sec. 550.)

Sec. 411. At the expiration of one year after the date when this Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security under this article, together with accrued interest to the date of the account, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section 410, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans. (Was 50 U.S.C.A. App., Sec. 551.)

Sec. 412. The balance in favor of the insurer in each case shall be certified by the Administrator of

Veterans' Affairs to the Secretary of the Treasury, who shall pay to the insurer the amount thereof, which is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, upon the surrender by the insurer of the certificates delivered to it from time to time by the Administrator of Veterans' Affairs under the provisions of this article. (Was 50 U.S.C.A. App., Sec. 552.)

Sec. 413. This article shall not apply to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium. (Was 50 U.S.C.A. App., Sec. 553.)

Sec. 414. This article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service. (Was 50 U.S.C.A. App., Sec. 554.)

Appendix C

PROFIT FACTOR IN OPERATION OF MONTHLY DIFFERENCE SYSTEM.

If the insurer had ten policies placed under protection in December 1940 each with annual premiums of \$50.00 coming due on January 1 of each year and all ten insureds were separated from service December 31, 1944, and allowed their policies to lapse at the end of protection December 31, 1945, and final settlement was made December 31, 1946, the Monthly Difference Reports would have shown the following:

Report for month of	Charges	Credits	Net
January 1941	\$500.00	—	\$500.00
January 1942	500.00	—	500.00
January 1943	500.00	—	500.00
January 1944	500.00	—	500.00
January 1945	500.00	—	500.00

and certificates, bearing 3% interest, would have been issued to the insurer. On settlement the Government would pay

\$500.00 on Certificate #1 plus 3% for 6 yrs. or	\$ 590.00
500.00 on Certificate #2 plus 3% for 5 yrs. or	575.00
500.00 on Certificate #3 plus 3% for 4 yrs. or	560.00
500.00 on Certificate #4 plus 3% for 3 yrs. or	545.00
500.00 on Certificate #5 plus 3% for 2 yrs. or	530.00

Total	\$2800.00
Cost per insured (1/10 of total).....	280.00

However if one insured died on December 31, 1943; one insured paid his back premiums and policy loan interest at 6% compound on the day of separation, December 31, 1944, and the policy of another insured

had sufficient cash value to cover all unpaid premiums with interest thereon at the policy loan rate at final settlement on December 31, 1946, the Monthly Difference Reports would have shown:

Report for month of	Charges	Credits	Net
January 1941	\$500.00	—	\$500.00
January 1942	500.00	—	500.00
January 1943	500.00	—	500.00
January 1944	450.00	168.63	281.37
January 1945	400.00	231.75	168.25
On Final Settlement		298.66	(298.66)

and on final settlement the Government would have paid:

\$500.00 on Certificate #1 plus 3% for 6 yrs. or	\$ 590.00
500.00 on Certificate #2 plus 3% for 5 yrs. or	575.00
500.00 on Certificate #3 plus 3% for 4 yrs. or	560.00
281.37 on Certificate #4 plus 3% for 3 yrs. or	306.69
168.25 on Certificate #5 plus 3% for 2 yrs. or	178.35
<hr/>	
Subtotal	\$2210.04
Less credit on final settlement.....	298.66
<hr/>	
Total	\$1911.38
Cost per insured (1/7th of total)	273.05

Adjustments to these figures for cash surrender values would complicate the computation without affecting the basic result. Application of surrender value would reduce the cost per policy pro tanto, but the difference between charges and credits due to the difference between 3% simple interest and 6% compound interest would remain.

Appendix D

TEXT OF 1942 AMENDMENTS TO ARTICLE IV OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

Sec. 400. As used in this article—

(a) The term “policy” shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers’ and Sailors’ Civil Relief Act Amendments of 1942 or not less than thirty days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans Act, as amended, or the National Service Life Insurance Act of 1940, as amended.

(b) the term “premium” shall include the amount specified in the policy as the stipend to be paid by the insured at regular intervals during the period therein stated.

(c) The term “insured” shall include any person in the military service of the United States as defined in section 101, article I, of this Act, whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined.

(d) The term “insurer” shall include any firm, corporation, partnership, or association chartered or authorized to engage in the insurance business and to issue a policy as above defined by the laws of a State of the United States or the United States. (50 U.S.C.A. App. Sec. 540.)

Sec. 401. The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the in-

sured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed \$10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of \$10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed \$10,000, and a policy which affords the best security to the Government shall be given preference. (50 U.S.C.A. App. Sec. 541.)

Sec. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Veterans' Administration concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy. (50 U.S.C.A. App. Sec. 542.)

Sec. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest. (50 U.S.C.A. App. Sec. 543.)

Sec. 404. No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Veterans' Administration. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Veterans' Administration. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article. (50 U.S.C.A. App. Sec. 544.)

Sec. 405. In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy brought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Administrator of Veterans' Affairs. (50 U.S.C.A. App. Sec. 545.)

Sec. 406. Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt

due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law. (50 U.S.C.A. App. Sec. 546.)

Sec. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article. (50 U.S.C.A. App. Sec. 547.)

Sec. 408. (1) The provisions of this article in force immediately prior to the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 (hereinafter in this section called "such provisions") shall remain in full force and effect with respect to all valid applications for protection executed prior to the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 and all policies to which such applications pertain shall continue to be entitled to the protection granted thereby.

(2) Any insurer under a policy accepted under such provisions shall, subject to the approval of the

Administrator of Veterans' Affairs and upon complete surrender by it to the United States, within ninety days after the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942, of all certificates issued in accordance with such provisions together with all right to payment thereunder, be entitled to the guarantee of unpaid premiums and interest thereon and the mode of settlement for such policies as provided by this article, as amended. The privileges and benefits granted by the foregoing sentence shall be in lieu of the method of settlement, and the requirement for accounts and reports prescribed by such provisions. In the event any such insurer fails to surrender within the said ninety days all such certificates and rights to payment, the accounts, reports, and settlements required to be made by such insurer under such provisions shall continue to be made as required and shall be governed by such provisions. (50 U.S.C.A. App. Sec. 548.)

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Appendix E

SUMMARY OF EXHIBITS 7, 8, 9, AND 10.

Insured	Policy #	Column 1	Column 2	Column 3	Column 4
		Paid to Insurer; Claimed by U.S.	Col. 3, Less One Year of Protection	Maximum Due, 1940 Act As of One Year After Separation	On Final Settlement 1/29/49
Plesha	419814	\$261.05	\$219.61	\$185.87	\$203.11
Kern	428642	264.36	209.63	160.42	187.21
Kern	395773	67.70	38.21	.84	18.98
Mabbutt	420558	205.75	199.98	171.06	184.20

Column 1 represents unpaid protected premiums plus interest at the policy loan rate, 6% compound, during the period the policies were listed as being under protection. For Plesha and Kern this period ended two years after separation; Mabbutt's policy was withdrawn from protection on February 27, 1947, 14 months after separation.

Column 2 represents the same calculation except that it assumes protection terminated one year after separation.

Column 3 represents unpaid protected premiums plus interest at 3% un compounded, from the date of protection to one year after separation.

Column 4 represents the same thing as Column 3, except that interest is calculated to January 25, 1949, the assumed final settlement date. It is assumed that the liability of the company to pay cash value (which under Section 410 became payable one year after separation) did not bear interest. If this liability did bear interest and the rate of interest could be supplied, the figures in Column 4 would be reduced by the amount of such interest.

Appendix F

38 U.S.C.A. 454a:

“Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provision shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. . . .

“From and after the date of approval of this amendatory Act (October 17, 1940) this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary or his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating to veterans, to such beneficiary or his estate or to his dependents as such: Provided, however, That if the benefits be insurance payable by reason of yearly renewable term or of United States

Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: . . .”

In the United States Court of Appeals
for the Ninth Circuit

PAUL E. PLESHA, JAMES E. MABBUTT AND MYRON L.
KERN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION

BRIEF FOR APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14,499

PAUL E. PLESHA, JAMES E. MABBUTT AND MYRON L.
KERN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION*

BRIEF FOR APPELLEE

This is an appeal from a judgment denying recovery in an action brought in the United States District Court for the Northern District of California, Northern Division. Appellant Plesha instituted this suit against the United States in May 1950 (R. 3-6). Alleging jurisdiction under 38 U. S. C. 801-818, he sought to recover an amount which had been withheld by the United States from a special dividend which had been declared on his National Service Life Insurance Policy (government insurance for servicemen). The United States had applied the amount withheld to reimburse itself for its payment, on his behalf, of defaulted premiums on a commercial life insurance policy which had been issued on his life before he entered the armed forces and which he had later brought under the protection of the Soldiers' and Sailors' Civil Relief Act of 1940. Appellants Mabbutt and Kern, being similarly situated, intervened as parties plaintiff (R. 31, 28). In an opinion filed following a trial, District Judge Dal M. Lemmon held that the appellants were indebted to the United States for the amounts withheld and that the set-offs were proper (R. 110-123). The opinion is reported at 123 F. Supp. 593. The facts are as follows:

1. *As to Appellant Plesha.*—Three months before entering active service in the armed forces of the United States, Plesha obtained a \$2,500 policy on his life from the California-Western States Life Insurance Company. Immediately after his entry into the service in March 1941, Plesha made application to his insurance company under the provisions of Article

IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1183-1186, 50 U. S. C. App. (1940 Ed.) 540-554 (*infra*, pp. 81-9), for the benefits and protection afforded by that Article in connection with this private life insurance policy.¹ The company submitted the application to the Veterans Administration which approved it and extended the Act's protection effective March 6, 1941. R. 126.

In May 1942, while he was in the service, the Government issued to Plesha a government life insurance policy, under the National Service Life Insurance Act, in the amount of \$10,000. On November 1, 1945, the amount was reduced to \$5000. This government policy was maintained in force by Plesha's payment of premiums until November 30, 1945. R. 4.

Meanwhile, Plesha failed to pay premiums on his commercial life insurance policy (R. 127), but because that policy was under the protection of the Soldiers' and Sailors' Civil Relief Act it did not lapse. See Sec.

¹ As we show below (*infra*, p. 21 *et seq.*) the purpose of the Civil Relief Act was to suspend temporarily the enforcement of certain civil liabilities of persons serving in the armed forces so as to free them from injury and harassment in connection with their civilian affairs during their period of military service. Article IV of the Act was designed to protect a serviceman from having his private (*i.e.*, non-governmental) life insurance policy lapse for failure to pay premiums while he was in military service. The scheme of the insurance provisions of the Act is detailed below, pp. 26-29. Very briefly, it provided that upon application of the serviceman and his insurance company to the Veterans Administration, and upon VA's approval, the United States would guarantee the payment of premiums becoming due on the serviceman's commercial life insurance policy during the period of his military service and for one year thereafter. The insurer agreed to keep the policy in force during this time despite default of premiums. If the insured failed to pay the defaulted premiums within one year after the termination of his military service, the insurer could obtain payment from the United States.

405, *infra*, p. 84. Plesha was separated from the service on October 20, 1945. R. 126. When the Veterans Administration learned of his separation, it sent him VA Form Letter FL 9-63 (R. 287-9) advising him (a) that he might terminate the protection being afforded his private insurance under the Civil Relief Act or continue such protection until two years after his discharge date;² (b) that any premiums accruing on his private policy but not paid by him during the period of protection would, upon an accounting, become an indebtedness which he would owe his insurance company, subject to any credit allowed by the company for the then cash value of the policy; and (c) that the Government guaranteed the payment of this amount to the insurance company and that any amount not paid by him to the company would be paid by the United States "to whom you will then owe whatever payment the Government made on your account." R. 126-127. Hearing nothing from Plesha, the Veterans Administration terminated the protection of his private policy on October 20, 1947, two years after his discharge. R. 127.

Thereafter, Plesha's insurer, California-Western States Life Insurance Company, reported to VA that Plesha's defaulted premiums with interest at the policy loan rate (6% compounded annually) for the period the policy had been protected aggregated \$343.93; that after crediting the cash surrender value of \$82.88 there

² Under the 1942 Amendment of the Civil Relief Act, the period of protection was enlarged from one to two years following insured's discharge (see Sec. 403, *infra*, p. 91). We are informed by the Veterans Administration that persons who had obtained protection under the original Act were automatically given this extended protection unless the insured expressed a contrary desire. See R. 287-9.

remained a balance of \$261.05 subject to payment by Plesha or the Government. On January 2, 1948, a United States Treasury check in that amount was drawn and dispatched to the Company. R. 127.

During the following month Plesha was informed of this payment to his insurer and was notified that this amount represented a debt due by him to the Government. *Ibid.* In March he wrote to VA stating he was not in a position to make payment and asked what mode of payment he could use "in order to take care of this obligation." He was told he could discharge the obligation by making payments of \$10 per month initially and later in increased amounts so as to "liquidate the entire indebtedness" within a year. Plesha accepted this plan of payment. He forwarded three checks totalling \$40 which were credited to him by VA. There remained an unpaid balance of \$221.05. R. 127-128.

In 1950, the Veterans Administration determined that Plesha's \$10,000 NSLI policy was entitled to participate in a special dividend to the extent of \$233.75, but it withheld payment of \$221.05 because of its determination that he was indebted to the United States in that amount for the protection afforded his private policy under the Civil Relief Act. R. 128. It paid him the \$12.70 balance, informing him that his indebtedness was thereby liquidated (R. 129), whereupon Plesha instituted this suit for the amount withheld.

2. *As to Appellant Mabbutt.*—Mabbutt obtained a private life insurance policy in the amount of \$2,500 from the California-Western States Life Insurance Company (the same insurer as in the case of Plesha)

in December 1940, three months before he entered active military service. Like Plesha, he applied for protection of his private policy under the 1940 Act immediately after entry into the service. His application was approved by VA effective March 12, 1941. Thereafter he failed to pay premiums on his policy. He was separated from the service on December 25, 1945. At Mabbutt's and his insurer's request, the protection was terminated as of February 22, 1947. The company reported that on that date the aggregate of defaulted premiums with interest at the policy loan rate (6% compounded annually) was \$269.25. After being credited with the cash surrender value of the policy (\$63.50), the United States paid the insurer, pursuant to its guaranty under the Civil Relief Act, the net amount of \$205.75. Mabbutt was informed of this payment on his behalf and was notified by VA that the sum paid represented a debt due by him to the United States. He ignored two requests for payment. R. 130-131.

Mabbutt had been issued a \$10,000 NSLI policy which was maintained in force by his payment of premiums from October 6, 1942 to February 6, 1948. R. 32. In May 1950 VA advised him that this government policy was entitled to a special dividend of \$352, that \$205.75 was being deducted from this sum in liquidation of his indebtedness to the United States, and the balance of \$146.25 was paid to him. R. 131. Mabbutt's complaint in intervention seeks recovery of the amount so deducted. R. 31-34.

3. *As to Appellant Kern.*—In December 1938 Kern was issued a private life insurance policy in the amount of \$2000 by the same insurer. In June 1941 the com-

pany issued another policy to him, in the amount of \$3000. Following his entry into active military duty and his application for protection of both policies under the Civil Relief Act of 1940, VA notified Kern and his insurance company that his policies would be protected effective with annual premiums due December 21, 1941 and June 23, 1942, respectively. R. 131-132.

Two years later, in December 1943, Kern informed VA that he had decided to pay the premiums on his private policies himself; he asked what papers had to be executed and "what options I may have to repay the Government for those premiums already paid by the Government on the above policies." In reply, VA informed him that it was unnecessary to execute any papers "as all premiums are to be paid direct to the insurance company when the insured is able to meet the premium payments." Kern, however, never did resume payment of his premiums. The protection of his policies was terminated February 8, 1948, two years after his separation from the service. R. 132.

The insurer reported to VA that the defaulted premiums plus interest at the policy loan rate (6% per annum) on Kern's 1938 policy totalled, for the period of protection, \$461.70; that it had a cash surrender value of \$394 applicable as credit, leaving a net amount due of \$67.70. The company reported that the defaulted premiums with interest on Kern's other policy totalled \$681.98; that there was a credit of \$417.62 for cash surrender value, leaving a net balance of \$264.36 unpaid for the period of protection. The aggregate indebtedness on the two policies was \$332.06. The United States paid this sum to the insurer on Kern's

behalf in April 1948 and promptly notified Kern of this action. R. 133. In September, 1948, Kern was again advised of this payment and was notified that the sum paid was a debt due by him to the United States. In October he wrote VA that payment of the total indebtedness would be difficult, and requested that he be permitted to pay \$5 per month initially. Thereafter he made payments totalling \$30, reducing the balance owed to \$302.06. R. 133-134.

Like the other plaintiffs, while in the service Kern had obtained a \$10,000 NSLI insurance policy. He kept this in force by payment of premiums continuously from February 1, 1942 until the date of his complaint. R. 29. In 1949 he applied for the special dividend and VA determined that his policy was entitled to a dividend of \$396. Against this amount, VA deducted and applied \$302.06 in payment of the indebtedness due for protection of his commercial policies, and sent him two checks for the remainder, totaling \$93.94. R. 134. Kern's complaint in intervention seeks recovery of the amount thus deducted. R. 28-31.³

³ The Court found that appellants' private policies contained provisions permitting the insureds to borrow from the insurer on the sole security of their policies, and that the policies did not impose on the insureds a personal liability to repay such policy loans (R. 135-6). He found, further, that pursuant to Sec. 408(2) of the 1942 Amendment of the Civil Relief Act (*infra*, p. 93-4), the insurer elected to settle its accounts with the United States as provided in Sec. 406 of the Amendment (*infra*, p. 92) (R. 135). Appellants were not consulted concerning this election, nor did they agree to any change in the relationship created by their application for protection and the approval of such applications (R. 137). A substantial number of other persons owning policies issued by appellants' insurer brought such policies under the protection of the 1940 Act. Of these, eight were terminated by death while the

4. *The Government's Answers.*—In its answers to the three complaints, the Government asserted (a) that the complaints fail to state a claim upon which relief can be granted; (b) that the district court had no jurisdiction over the causes alleged because a suit for recovery of dividends is not cognizable under 38 U. S. C. 817, and because there is no disagreement between appellants and VA with reference to the NSLI dividends within the meaning of 38 U. S. C. 817; and (c) that the dividends sued for had been paid partly in cash and partly by applying them in payment of appellants' debts to the United States. R. 6-7; 96-7; 103-4.

5. *The District Court's Decision.*—(a) The Court held that 38 U. S. C. 817, 445 and 551 conferred jurisdiction over the causes of action alleged. These sections permit suit in the event of a disagreement as to a claim for insurance benefits. Rejecting a 10th Circuit decision to the contrary,⁴ the Court held that a claim for a dividend is a claim for an insurance benefit. He held, also, that there is a disagreement within the meaning of these sections. R. 112-116. (b) Proceeding to the merits, the District Court followed the decision in *United States v. Nichols*, 105 F. Supp. 543 (N. D. Ia.), app. dismissed, 202 F. 2d 956, 958 (C.A. 8), and held that upon appellants' application, the United States had guaranteed payment of their defaulted premiums; that under common law principles the United States would be entitled to reimbursement; and

policies were protected. Thirty-eight policy holders either paid the insurer in cash the amount of unpaid premiums plus interest at the policy loan rate, or fully paid such premiums and interest by applying the cash value of the policies thereto. R. 137. The Court also made findings concerning the administration of the 1940 Act and statements about the Act made by VA officials (R. 136).

⁴ *Candell v. United States*, 189 F. 2d 442, 444 (C.A. 10).

that neither the 1940 Civil Relief Act nor its legislative history indicate Congressional intent to abrogate that common law right of reimbursement. R. 116-117. Observing that no other country in the world has been so generous as the United States in its treatment of servicemen and veterans, Judge Lemmon quoted appellants' statement that "they expected the Government 'to give them a free ride in their private insurance' " (R. 110), and declared that in the absence of Congressional mandate, he was "not prepared to assist in this latest attempt to siphon off some more of the nation's already fast-ebbing public fisc" (R. 119). To impute to Congress an intent that these payments be a gift would result in serious discrimination and inequity (R. 118). (c) He held that when the Government paid appellants' premiums, there resulted, in effect, an overpayment to appellants and therefore the bar of 38 U. S. C. 454(a) (which prohibits the United States from offsetting debts against veterans' benefits, except in cases of overpayments) is not applicable (R. 119-123). (d) He rejected appellants' other arguments, such as the "increased liability" contention, as having no merit (R. 123).

Judgment denying relief was entered March 16, 1954 (R. 124). The notice of appeal was filed June 25, 1954 (R. 138-9).

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over the causes alleged in the complaint;
2. Whether the appellants are obligated to reimburse the United States for its payment to their insurer, on their behalf, of their defaulted premiums on their private insurance policies after they requested that such

policies be protected under the Soldiers' and Sailors' Civil Relief Act of 1940; and if so,

3. Whether the indebtedness arising therefrom may be set-off against NSLI dividends payable to appellants.

SUMMARY OF ARGUMENT

I. The district courts have no jurisdiction to review decisions of the Administrator of VA except in the event of a disagreement as to a claim for an insurance benefit (38 U. S. C. 445, 817). An insurance benefit is a payment of money as indemnity for a loss insured against. Appellants are seeking recovery of a dividend; since a dividend does not fall within the definition of a benefit, there is no jurisdiction over the suit. Moreover, no disagreement under the NSLI Act exists, for there is no dispute between the parties regarding the right to, and the amount of, the dividend. The dividend involved has been paid and the Administrator's determination as to the manner of payment is final. The disagreement in this case relates not to the dividend, but to whether appellants were indebted to the Government under the Civil Relief Act. Thus, the second jurisdictional prerequisite to a suit under the NSLI Act is lacking.

II. a. The Soldiers' and Sailors' Civil Relief Act of 1940 is substantially identical to and virtually a reenactment of the Civil Relief Act of 1918. The legislative history and administrative construction of the 1918 Act are essential guides to the interpretation of the 1940 Act. Both were intended to protect servicemen from prejudice and harassment in connection with their civilian affairs during their period in uniform. To that end, the Acts temporarily suspend the enforce-

ment of certain civil liabilities of servicemen. The liabilities are not forgiven or wiped out, but only deferred.

Insurance is covered by Article IV of both Acts. Recognizing that failure to pay premiums would result in the lapse and forfeiture of private policies, Congress provided that, upon request of the insured and upon consent of the insurer to keep the policies in force despite default of premiums, the United States would pay the defaulted premiums with interest if the insured did not after his separation from the service. The history of the 1918 Act discloses, beyond any question, that Congress intended to create a transaction of guaranty involving a primary debt from the insured to his insurer for premiums accruing during the insured's military service and one year thereafter, and a guaranty of that indebtedness by the United States. The provisions of Article IV were written specifically to meet the objections of the insurance industry to a proposed bill which failed to provide for such an indebtedness. As revised and passed, the bill provided for a consensual arrangement and included provisions manifestly intended to safeguard the United States against any loss as guarantor (*e.g.*, the United States is given a first lien on the policy; it is credited with the cash surrender value of the policy on settlement, etc.). The legislative discussions and the terms of the Act demonstrate that it was not intended to bestow a gratuity, and that Congress contemplated that the United States be reimbursed by the insured for its payments on his account.

b. In construing the 1918 Act, the Veterans Bureau applied elementary principles of the law of guaranty, viz., that the principal debtor (the insured serviceman)

must reimburse the guarantor (the Government) for its payment of his debt (premiums) to the creditor (the insurance company). The Bureau sought and obtained reimbursement from servicemen who had applied for and received the protection of the 1918 Act, and it formally advised Congress of this administrative construction. In 1940, Congress reenacted the 1918 Act without material change and without any indication of disapproval of this construction—indeed, the only time the question of reimbursement arose while reenactment was being considered, the House was told that the law would require the insured to make repayment. Any mistaken representations later made by officials on the question cannot bind or estop the Government.

In 1942 Congress amended the 1940 Act by providing expressly that these payments by the United States “shall become a debt due to the United States” and shall be collectible from the insured. This amendment, which simply wrote into the statute the recognized common law principle applicable to all guaranties, did not change the 1940 Act in that respect. It merely made explicit what theretofore had been implicit. The amendment was described in Congress as a clarification and liberalization of the 1940 Act, terms which would be wholly inapposite if appellants’ views were correct that what had been a gratuity would thereafter be a debt.

e. Having requested and received insurance coverage from his insurer, the insured was under a primary obligation to the insurer to pay the defaulted premiums. The United States, as a guarantor, paid that debt on his behalf and is entitled, under common law principles, to be reimbursed. The transaction was described re-

peatedly by the Congress, in debates and reports, as a guaranty. When Congress utilizes a legal transaction familiar to the common law, it must be assumed that Congress meant to give that transaction the same incidents and consequences as would result from such a transaction at common law; where the transaction is a guaranty, the guarantor is entitled to reimbursement even in the absence of an express agreement by the principal debtor. The specific remedies given by the Act to the United States (lien, credit for cash surrender value, etc.) are provisional in nature and manifestly were intended to safeguard and supplement, rather than to replace, the common law remedy of reimbursement. To hold that the insured may escape reimbursement would create inequitable and discriminatory results.

III. The *Gilman* decision, 347 U. S. 507, is an exception to the historic rule that no express statutory authority is needed for the United States to enforce established rights which others, similarly situated, would have. The unique considerations involved in *Gilman* which led to the exception, are not present here. In any event, Congress has indicated a position requiring the insured to reimburse the United States.

The *Hormel* case (123 F. Supp. 806), on which appellants place primary reliance, is erroneous. Appellants' argument, based on *Hormel*, that the lien on the policy provides the sole remedy of the Government—because of the supposed impossibility of determining the amount of the claim for reimbursement—is self-defeating, for, by the same reasoning, it would be impossible to determine the amount which the lien secures.

IV. The United States has the same right of set-off which every creditor has. While 38 U. S. C. 454a ex-

empt's veterans' benefits from set-off, it does permit the set-off of overpayments made under veterans laws. Under the consistent administrative practice and construction, a payment of a veteran's debt on his behalf under a law relating to veterans constitutes such an overpayment. Accordingly, the United States had the right to set-off appellants' indebtedness against their dividends.

ARGUMENT

Preliminarily, it should be noted that the question on the merits presented in this case has never been passed upon by an appellate court. The question is of major importance because there are still outstanding thousands of Civil Relief Act reimbursement claims like those here involved, representing in the aggregate a very large sum.⁵ The problem was first considered in 1943 by the Administrator of VA who ruled that a debt rather than a gratuity resulted from the Government's payment of the insured's defaulted premiums. *Decisions of the Administrator of VA, No. 513, Vol. 1, p. 781*. Four years later in a decision which carefully and extensively reexamined the question, the Administrator reaffirmed his earlier ruling. *Decisions, supra, No. 742, Vol. 1, Supp., p. 93* (set out at R. 62-94). Subsequently, the issue was litigated in four reported district court cases apart from the instant one. The first and leading case is *United States v. Nichols*, 105 F. Supp. 543 (N. D. Ia.) app. dism'd, 202 F. 2d 956, 958 (C. A. S.) where, after a comprehensive analysis of the

⁵ Through June 30, 1942, VA had approved more than 23,400 applications for protection of private insurance policies under Article IV of the 1940 Act, representing insurance in the face amount of over \$56,500,000. By that date the Government had issued certificates to insurers guaranteeing defaulted premiums in an amount of almost \$1,017,000. See *Annual Report of the Administrator of Veterans Affairs for the Fiscal year Ending June 30, 1942, p. 31*.

Act and review of its history, the court held that the United States is entitled to reimbursement. *Morton v. United States*, 113 F. Supp. 496 (E. D. N. Y.) and the decision below reached the same result. *Hormel v. United States*, 123 F. Supp. 806 (S. D. N. Y.) and *United States v. Hendler*, 123 F. Supp. 383, holding otherwise, are discussed below, p. 57, *et seq.* Both are pending appeal.

I

The Trial Court Had No Jurisdiction of this Action

It is settled law that no action lies against the United States unless the Congress has authorized it. *United States v. Shaw*, 309 U.S. 495; *Munro v. United States*, 303 U.S. 36. When the Congressional authorization is a restricted one, there must be "due regard" for "such restrictions as have been imposed." *Dalehite v. United States*, 346 U.S. 15, 31. Congress has provided (38 U.S.C. 11a-2) that no court shall have jurisdiction to review any decision of the Administrator of Veterans Affairs "on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration" *except* as provided in 38 U.S.C. 445 and 817 (*infra*, pp. 94-6, 97). Appellants argue that the latter sections furnish the requisite jurisdiction in this case.

Sec. 817, which is part of the National Service Life Insurance Act (an Act administered by the Veterans Administration) provides that in the event of a disagreement as to any claim under that Act, suit may be brought under the conditions set forth in Sec. 445. And Sec. 445 states that suit may be brought in the district courts "in the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Admin-

istration and any person or persons claiming thereunder". It states further that, as used in this Section, the term *claim* "means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits"; it defines *disagreement* as "a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name". It is apparent, then, that the district court had no jurisdiction over this suit for NSLI dividends unless (1) appellants have filed a "claim" for "insurance benefits", and (2) the Administrator has denied this claim, thereby giving rise to a "disagreement". Appellants have not met either of these jurisdictional requirements.

1. Unless a NSLI dividend falls within the meaning of the term "insurance benefit," it is obvious that appellants' application for that dividend cannot come within the statutory definition of a "claim". Apart from the decision below, we know of only one court, the Tenth Circuit, which has specifically passed on this question: in *Candell v. United States*, 189 F. 2d 442, a suit involving NSLI dividends, the Tenth Circuit held that a NSLI dividend is *not* an insurance benefit, that an insurance benefit is something paid as indemnity for a loss insured against, and, consequently, that the district court had no jurisdiction over the subject matter in controversy.⁶

⁶ Defining a contract for insurance as an agreement whereby the insurer, for a consideration, undertakes to indemnify the insured or his designee against loss from a specified future contingency, the Court, per *Phillips, C.J.*, went on (189 F. 2d at 444-5; emphasis added):

An insurance benefit means money or its equivalent paid as indemnity for a loss insured against. A dividend upon a Na-

Appellants seek to avoid the result reached in the *Candell* case by arguing that, if “a dividend is a return of premium” as held in *Candell*, then a suit upon a dividend falls specifically within the terms of 38 U.S.C. 445: “In the event of disagreement as to claim, including claim for refund of premiums * * *” (Op. Br., p. 9). But a return of premiums in the form of a *dividend* is not a “refund of premiums” within the meaning of that Section. The “refund of premiums” which may be the subject of a disagreement under Sec. 445 was added to the Section by an amendment in 1930 (46 Stat. 1016) so as to permit suit for premiums refundable by reason of the insured being entitled to a waiver of premiums, as where he is totally disabled. A “refund of premiums” was thus a contingency insured against and a “benefit” under the contract, along with disability benefits and death benefits. A dividend, on the other hand, as the *Candell* case holds, is available only because the aggregate payment of premiums exceeds the amount needed to meet “benefit” payments.⁷

tional Service Life Insurance policy is paid under the terms of the contract which gives the insured the right to participate in gains and savings of the National Service Life Insurance Fund as they may be determined by the Administrator. *Such a dividend is a return of premium* [citations omitted]. *Such a dividend has no relation to the obligation to pay indemnity on the happening of the loss insured against* [citations omitted].

Sections 602 and 607 of the National Service Life Insurance Act, as amended, 38 U.S.C.A. §§ 802 and 807, employ the term “benefits” and “insurance benefits”, but in each instance where the terms are used, the context makes clear that they refer to payments made upon the death or disability of the insured.

Accordingly, we conclude that the instant action is not upon a claim within the meaning of [38 U.S.C. 817], and that the trial court was without jurisdiction.

⁷ In holding that a dividend is an insurance benefit, contrary to the *Candell* case, Judge Lemmon pointed to the language of 38

2. Even if it be assumed *arguendo* that a dividend is an insurance benefit, there is no jurisdiction because the case presents no disagreement as to a claim under the NSLI Act.⁸ This suit involves two separate and distinct elements, first, appellants' claim for dividends under the NSLI Act, and second, the Government's separate claim for reimbursement under the Civil Relief Act. The dispute in this case relates to the Government's claim under the Civil Relief Act; there is no dispute as to the dividends.⁹ The Administrator agrees with appellants as to their right to and as to the amount of the NSLI dividends. In fact, without this initial agreement that the dividends were owing to appellants, there would have been no occasion for application of those dividends in payment of appellants' indebtedness under the Civil Relief Act. The Administrator contends, however, that the dividends were paid, partly in cash and the remainder in discharge of appellants' separate indebtedness to the United States. A disagreement as to the manner in

U.S.C. 454a and stated that it was part of the very statute being construed in *Candell* (R. 113). He apparently was not aware that when Sec. 454a was adopted by reference into the NSLI Act via 38 U.S.C. 816 (54 Stat. 1014, approved Oct. 8, 1940), it did not contain the language to which he referred. Those words were added by amendment later (54 Stat. 1195, approved Oct. 17, 1940). Accordingly, there was no warrant for reliance upon language subsequently injected into an Act covering a different subject.

⁸ There can be no doubt that a disagreement, *i.e.*, "a denial of the claim by the Administrator" (38 U.S.C. 445), is a jurisdictional requirement. *Berntsen v. United States*, 41 F. 2d 663 (C. A. 9); *United States v. Densmore*, 58 F. 2d 748 (C.A. 9), cert. den. 287 U.S. 598; *Bono v. United States*, 113 F. 2d 724 (C.A. 2); *Tohulka v. United States*, 204 F. 2d 414 (C.A. 7); *Leyerly v. United States*, 162 F. 2d 79 (C.A. 10).

⁹ See fn. 11, *infra*, p. 19.

which dividends are paid is not the kind of disagreement covered by Secs. 817 and 445.¹⁰

3. Two other district courts ruled that they had jurisdiction in this type of case, but neither placed any reliance on Sec. 817. *Morton v. United States*, 113 F. Supp. 496 (E.D. N.Y.); *Hormel v. United States*, 123 F. Supp. 806 (S.D. N.Y.) (appeal pending).¹¹ Instead, both held that jurisdiction may be founded on the Tucker Act, 28 U.S.C. 1346 (a) (2). Manifestly, however, the Tucker Act is not applicable, for it only authorized the district courts to sit as a court of claims, and "the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims." *United States v. Sherwood*, 312 U.S. 584, 590-591. It is clear that the Court of Claims has no jurisdiction over suits based upon insurance policies administered by the Veterans Administration generally and NSLI policies in particular—Congress has vested such jurisdiction exclusively in the district courts under 38 U.S.C. 445 and 817. *Peyton v. United States*, 100 F. Supp. 823

¹⁰ 38 U.S.C. 805 states that the NSLI fund shall be available for dividend payments, and that "Payments from this fund shall be made upon and *in accordance with awards by the Administrator*." (Emphasis added.) Similar language appears in the NSLI policy. The United States did not undertake as a part of its contract to pay dividends to this policyholder. The Administrator's determination in that regard was final. 38 U.S.C. 11a-2.

¹¹ In *Hormel* the district judge pointed out that "there is no controversy" over any claim for NSLI benefits; that it is "conceded that plaintiffs are entitled to the full dividend under such policies. The decision that the Administrator has made and of which they complain is the decision that they owe the Government reimbursement for payments made by the Government under a different Act, the Soldiers' and Sailors' Civil Relief Act." 123 F. Supp. at 809-810.

(C. Cls.), certiorari denied, 343 U.S. 909; *Holliday v. United States*, 87 F. Supp. 367 (C. Cls.). *Prouty v. United States*, 94 F. Supp. 320 (D. N.H.); *Byrd v. United States*, 103 F. Supp. 128 (N.D. Oh.).

4. In rejecting the authority of the Tenth Circuit's holding in the *Candell* case, 189 F. 2d 442, the court below (R. 114) cited and quoted *United States v. Zazove*, 334 U.S. 602, 611-612, for the proposition that Congress intended that the courts should have review power over the Administrator's decision on insurance matters generally. The *Zazove* case, however, does not go that far. That case did not modify or involve the scope of 38 U.S.C. 445 and 817. Instead, it involved the effect of an amendment of 38 U.S.C. 808, which, the Supreme Court noted (334 U.S. 612), was indicative of Congressional concern that VA's *regulations* be subject to judicial scrutiny. That such amendment and that the quoted language of the *Zazove* opinion do not effect a broadening of the jurisdiction granted by Sec. 817 is apparent from later decisions discussing that question. *Rowan v. United States*, 211 F. 2d 237 (C.A. 3), aff'g 115 F. Supp. 503 (reviewing the cases); *Mitchell v. United States*, 111 F. Supp. 104, 107 (D. N.J.); cf. *United States v. Fitch*, 185 F. 2d 471, 474 (C.A. 10).¹²

The court below seems to have been influenced by the fact that the United States has itself invoked the juris-

¹² That the Administrator's determination is final not only as to the denial of a claim but also as to a decision for recovery or restitution where moneys have already been paid, see *United States v. Gudewicz*, 45 F. Supp. 789 (E.D. N.Y.); *In re Rosa's Estate*, 172 Misc. 808, 16 N.Y.S. 2d 285; cf. *United States v. Mroch*, 88 F. 2d 888, 890 (C.A. 6). Also see 50 U.S.C. App. 547 providing that the Administrator's determinations of fact and law in administering Article IV of the Civil Relief Act shall be final.

diction of the district courts to recover reimbursement under the Civil Relief Act (R. 115-6). This ignores the established rule that the forum is always open to the sovereign to bring suit in its own behalf, even as to matters in which it is itself immune for suit. See 28 U.S.C. 1345; and see *infra*, pp. 58-60.

II

The Insurance Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 Created a Transaction of Guaranty

The 1940 Act has its roots in the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, 40 Stat. 440, enacted during World War I. The 1918 Act is set out in Appendix A, *infra*, pp. 73-80. The general purpose of that Act and that of 1940 are identical and their language is virtually the same. Indeed, the 1940 Act has been described by the Supreme Court as a "substantial reenactment" of the 1918 Act (*Boone v. Lightner*, 319 U. S. 561, 565), and by its draftsmen as "an up-to-date revision" of the 1918 Act.¹³ Because of this close affinity, recourse to the legislative history of the 1918 Act and to its administrative construction are pertinent and instructive in interpreting its later reenactment. Cf. *ibid.*, 319 U. S. at 365-9.

A. The legislative history of the 1918 Act demonstrates that Congress intended the transaction to be one of guaranty

1. The original draft of the 1918 Act was prepared by the War Department under the supervision of eminent attorneys headed by Dean John H. Wigmore, then serving as an officer in the Office of the Judge

¹³ Letter of Secretary of War Stinson to the Speaker of the House, H. Rept. No. 3001, 76th Cong. 3d Sess., p. 5.

Advocate General. As stated in the letter of transmittal to the Congress from the Secretaries of War and of the Navy, the bill was intended "to free persons in the military service of the United States from harassment and injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation."¹⁴ It was emphasized that this objective was to be achieved *not* through a gratuitous discharge of civil liabilities, but rather by providing a temporary suspension of remedies which, if enforced against servicemen while they were away, might prejudice their civilian affairs. The method of the Act was to preserve creditors' rights but to suspend or postpone proceedings and transactions during the soldier's or sailor's absence, "so that he may have an opportunity, when he returns, to be heard and to take measures to protect his interest."¹⁵

¹⁴ *Hearings and Memoranda before the Subcommittee of the Committee on the Judiciary, U. S. Senate, 65th Cong., 1st and 2d Sess., on S. 2859 and H. R. 6361, p. 5.*

¹⁵ *Op. cit., supra*, fn. 14. Introduced in the Senate as S. 2859 on September 11, 1917, and in the House as H. R. 6110 one week later, the bills were referred to the respective Committees on the Judiciary. Testifying before the House Committee, Dean Wigmore stated as to the original draft: "In every one of the 8 or 10 measures calculated to relieve a specific need of the soldier or sailor * * * we stopped at suspending the remedy. In no instance, so far as I in good faith can say, is any man's rights or property taken from him, lost, or destroyed. He is simply held back for a time in his remedy. There is a soldier going to war. The creditor comes in and we say, 'Hold on, hold back. That man is away in the army. He is fighting for you. Wait until he comes back. Do not jump on him while he is away. *You will have every remedy back in your hands the minute that he is returned* and has gotten himself together and got his uniform off.' * * * The whole theory is simply to hold the hand. Throughout the bill, so far as I am able to see it, *there is nothing more done than suspension of remedy.*" *Ibid.*, p. 87 [emphasis added].

In general, the bill conferred wide discretionary powers upon the courts to grant stays in proceedings and transactions involving servicemen; it virtually barred default judgments against persons in service; and it had specific provisions to safeguard servicemen with regard to contracts which impose a continuing liability, such as leases, mortgages, installment purchases, etc. See *op. cit., supra*, fn. 14, at pp. 27-28.

Insurance contracts were regarded as being in the latter category. As to life insurance, the proposed law prohibited the forfeiture or lapse of certain policies of servicemen for nonpayment of premiums falling due during their period of military service. It provided that such defaulted premiums shall be charged to the policy as a loan and could be paid by the insured with interest at the policy loan rate at any time within six months after the termination of the insured's military service.¹⁶ Spokesmen for the insurance industry appeared before the Senate Committee considering the bill and vigorously objected to this feature of the bill. They asserted that it would compel the insurance companies to maintain policies in force despite nonpayment of premiums, contrary to the terms of the insurance contract; that in reality the serviceman was being given an option to pay or not to pay his defaulted premiums, as he saw fit, upon his return from the war, because the bill failed to provide a consensual and enforceable obligation with reference to premiums accruing in the

¹⁶ Sec. 13 of S. 2859, 65th Cong., 1st Sess.; *op. cit. supra*, fn. 14, at pp. 18-21, 31. The section also suggested machinery under which the beneficiaries of servicemen whose premiums were in default could contact relief organizations who would render assistance in payment. *Ibid.*

future; in other words, there would be no debt running from the insured to the insurer.¹⁷

Discussion at the Senate Hearings indicated a common desire by members of the Committee to afford protection of some kind with regard to servicemen's outstanding private insurance but strong opposition to providing free insurance or to forcing the companies to maintain the policies while the serviceman would have an election to pay or not to pay his defaulted premiums upon his return to civilian life. Senator Reed, one of the most active participants at the Senate Committee hearings, declared that it was "absurd" to propose that "at the end of the war the soldier shall have the option to pay or not to pay, as he sees fit. * * * I did not think it would be claimed that a thing of that kind could be done." *Op. cit. supra*, fn. 14, at p. 114.¹⁸ Finally, after considerable discussion, Dean Wigmore suggested that these objections could be eliminated by modifying the bill so as to provide for a *guaranty* by the Government that the

¹⁷ They explained that under the usual contract of insurance both parties agree that the premium paid shall keep the policy in force only until the date on which the next premium becomes due; the policyholder is not under any obligation to pay the succeeding premium—if he chooses to pay, the insurance contract remains in force until the subsequent premium becomes due, but if he chooses not to pay, the contract terminates. If the company nevertheless continued to extend insurance coverage, as the bill required it to do, it was feared that the company would have no legally enforceable claim against him for future premiums because the policyholder had never requested or agreed to renewal of his contract. *Op. cit. supra*, fn. 14, at pp. 102 *et seq.*

¹⁸ It may be noted in passing that this is precisely the result which would be reached if appellants' contentions in the present case are sustained and if the decision below is reversed: the insured would be held to have an option to pay or not to pay his defaulted premiums, as he pleases.

premiums would be paid. The Committee welcomed this suggestion and directed that he sit down with industry representatives and draft such a provision.¹⁹

2. Three days later, after having worked with the company representatives, Dean Wigmore reappeared before the Committee with a draft of a separate act entitled "A Bill to provide a mode of *guaranty* against lapse or forfeiture of life insurance policies held by persons in military service."²⁰ Its provisions (which, with minor changes, were later enacted as Article IV of the 1918 Act and ultimately were incorporated in the 1940 Act) were substantially different from those proposed in the original bill. The latter had merely imposed a flat prohibition of lapse of policies for non-payment of premiums; the arrangement was nonconsensual and therefore, as the industry had argued, offered no assurance to insurance companies that they

¹⁹ "Maj. WIGMORE. * * * I am sure I do not want the Government to pay my insurance premiums, and there must be thousands like that who do not want any favors or charities in that way. If the suspension of those forfeitures, from the point of view of Mr. McIntosh [a spokesman on behalf of the insurance companies], will impose an undue burden on the companies, why can you not get at it in that way by simply, through an act of Congress, guaranteeing them against losses? Then all of us who go on paying our policies are taken care of in their own way, and those of us who have, by inadvertence, not paid our premiums, would be taken care of, and thus not throw an undue burden on them.

"Senator FLETCHER. That is a sound suggestion.

"Maj. WIGMORE. There is no constitutional objection to that.

"Senator OVERMAN. Suppose you draw up such an amendment as that.

"Senator REED. That is a practical suggestion. Sit down with these gentlemen representing the companies and agree on a section that will carry out this suggestion." *Op. cit. supra*, fn. 14, at p. 120.

²⁰ Emphasis added. The full text of the draft bill is set out at pp. 124-131, *op. cit. supra*, fn. 14.

would ever receive or even have the right to enforce the payment of premiums for the period during which the proposed law required that they keep the policies in force. The new bill, however, not only provided for a consensual arrangement, thereby furnishing a foundation for a legal claim by the insurance company against the insured for payment of defaulted premiums, but also provided a firm guaranty by the Government that these premiums would be paid.

In brief, the new proposal provided (and the 1940 Act is virtually the same) that the protection afforded by the Act was to be available only if the serviceman filed appropriate application with his insurance company. The form to be used was to state specifically that the making of the application "is a consent to such modification of the terms of the original contract of insurance as is made necessary by the provisions of the Act." The bill provided further that by receiving the original and thereafter filing a copy of this application with the Bureau of War Risk Insurance (now the Veterans' Administration), the insurance company shall be deemed to have assented to such modification.²¹ It should be observed at this point that these provisions spell out the voluntary and consensual arrangement between the insured and the insurer. Contrary to appellants' statement (Op. Br., p. 42), under the Act, neither party was compelled to go forward. The law did not compel the serviceman to keep his private insurance in force; nor was the insurance company compelled to keep the policy alive even after the serviceman had elected to do so by the filing of his

²¹ These terms appear in Sec. 401 of the 1940 Act, *infra*, p. 82.

application. Only when both parties to the contract agreed did the insurance policy remain in force.

Upon receipt of the application, the Bureau of War Risk Insurance (the VA under the 1940 Act) was to determine the eligibility of the applicant and of his policy and immediately to notify both the insured and the insurer of its approval. The protection afforded was limited to life insurance policies in a face amount not exceeding \$5,000.²²

The bill provided that no policy thus brought within the benefits of the Act shall lapse or be forfeited for nonpayment of premiums during the insured's period of military service and for one year thereafter.²³ It further provided for a monthly accounting between the insurance companies and the Government.²⁴ Each month every company whose policies were protected was to render a report to the Bureau of War Risk Insurance listing *inter alia*, with reference to the protected policies, the premiums defaulted during the past month, listing also the defaulted premiums paid

²² These terms appear in Secs. 402-404 of the 1940 Act, *infra*, pp. 83-4. Under the new bill drafted by Dean Wigmore and the industry representatives, insurance contracts were not eligible for the Act's protection unless they "were made and *two full years premiums* were paid thereon before September 1, 1917" (*op. cit. supra*, fn. 14, at p. 126; emphasis added). As enacted, however, the 1918 Act limited eligibility to contracts made and on which a premium was paid before September 1, 1917; since the bill was enacted March 8, 1918, this meant the policy had to be approximately six months old. 40 Stat. 440. And this requirement was further reduced under the 1940 Act which permitted protection when the contract was "made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service." Sec. 402, *supra*.

²³ This appears in Sec. 405 of the 1940 Act, *infra*, p. 84. The Section provides, however, that the prohibition against lapse shall not extend for more than one year after expiration of the Act.

²⁴ This appears in Sec. 406 of the 1940 Act, *infra*, pp. 84-5.

on such policies by the insureds during the past month, and computing the difference in the two amounts. Upon verification by the Bureau of this "monthly difference," the Secretary of the Treasury was to deliver an equivalent amount of Government bonds to the insurer each month to "be held as security by the respective insurers as security for the payment of the defaulted premiums with interest."²⁵ In the event of the death of the insured, the previously defaulted premiums with interest at the policy loan rate were to be deducted from the proceeds of the policy. Such deduction was to be credited to the Government in the next monthly report as premiums paid.²⁶

If the insured did not within a year after the termination of his military service pay to the insurance company all past due premiums with interest at the policy loan rate, the policy was to lapse and become void. In that event, the insurer was to become liable immediately to pay the cash surrender value of the policy.²⁷ However, "*to indemnify it against loss,*" the United States was to have a first lien upon the policy.²⁸ One year following the end of the war there was to be an account stated between each insurer and the United States. In that account the United States was to be credited with the amount of the cash surrender value of

²⁵ In lieu of bonds provided for in the 1918 Act, Sec. 407 of the 1940 statute (*infra*, p. 86) directed that each month the Administrator of VA deliver to each insurer a certificate in the amount of the monthly difference. The certificates were payable within 60 days after the final accounting between the insurer and the Government and were to bear interest at a rate to be prescribed by the Secretary of the Treasury.

²⁶ This appears in Sec. 409 of the 1940 Act, *infra*, p. 86-7.

²⁷ This appears in Sec. 410 of the 1940 Act, *infra*, p. 87.

²⁸ Emphasis added. This appears in Sec. 408 of the 1940 Act, *infra*, p. 86.

each lapsed policy up to the amount of the unpaid premiums with interest at the policy loan rate. At that time and upon surrender of the bonds (certificates under the 1940 Act), the total balance in favor of the insurer was to be paid by the United States.²⁹

3. The revised insurance provisions were considered at subsequent hearings. *Op. cit. supra*, fn. 14, at p. 123 *et seq.* Dean Wigmore testified that the new proposal met the objections of the industry. *Ibid.* at p. 132. He agreed with Senator Overman's interpretation that under the new proposal the serviceman would be subject to a debt, for he would owe the premiums to the insurance company,³⁰ and that if he failed to pay that debt, the Government would (*id.* at p. 134). Questioned as to whether the Government could obtain repayment from the serviceman, Dean Wigmore answered affirmatively and went on to explain that in his belief the cash surrender value of the policy, which was subject to the Government's lien, would in most instances be sufficient to recoup the expenditure.³¹ *Id.*, at 135. He was not asked and therefore furnished no specific answer to whether, in his view, the Government would be denied the right of recourse against the serviceman for any deficiency. On the other hand, he had stressed earlier that the whole approach in writing the original bill was merely to suspend remedies for a temporary period, and not to deprive any creditor of his

²⁹ This appears in Secs. 411, 412 of the 1940 Act, *infra*, pp. 87-8.

³⁰ Compare the industry's objections to the original bill which failed to provide an enforceable obligation of the insured, *supra*, pp. 23-4.

³¹ Under his revised proposal, a policy was not eligible for protection unless at least two full years' premiums had been paid by the serviceman. But see fn. 22, *supra*, p. 27.

rights. See pp. 21-24 and fn. 15, *supra*. The revised insurance provisions did not change that approach; rather, they were designed to strengthen it. They were intended to meet the unique problem of insurance contracts by creating a debt enforceable against the policyholder for the unpaid premiums, and, through the Government's guaranty, assuring prompt payment of that debt.

Meanwhile, apart from the insurance provisions of the Civil Relief Bill initially submitted to the Congress, the House Committee found it desirable to make certain other changes. As a result, it was rewritten and the revised version was introduced as a new bill (H. R. 6361, 65th Cong., 1st Sess.). The separate insurance bill, which Dean Wigmore and the industry spokesmen had worked out to effectuate a governmental guaranty of payment of defaulted premiums, was, with only slight change, included as Article IV of this new bill.

Reporting the bill favorably, the House Committee on the Judiciary described the insurance Article as providing "a scheme for the Government to carry the premiums on not more than \$5,000 of life insurance of a man in military service who is unable to pay this premium." H. Rept. No. 181, 65th Cong., 1st Sess., p. 7. While the Report has no specific reference to the question of whether the serviceman will be obligated to reimburse the Government if it is called upon to pay his defaulted premiums, there are a number of indirect indications that a debt rather than a gratuity arises at that point. Thus, the Report distinguishes between the "boon" or gratuity provided under the war-risk (government) insurance bill and the instant

arrangement.³² The voluntary and contractual nature of the transaction contemplated by the bill was also a subject of comment.³³ And in numerous places the relationship of the Government to the transaction was specifically termed a "guaranty."³⁴

With but minor changes,³⁵ the bill was passed by both houses of the Congress and was enacted into law on March 8, 1918, 40 Stat. 440.

³² "The insurance provisions of the bill cover an entirely separate field from the insurance provisions of the war-risk insurance bill. That bill gives new insurance to soldiers and sailors *as a boon from the Government*; this section protects rights in insurance previously bought by the soldier or sailor with his own money and already in force." H. Rept. No. 181, *supra*, p. 7. [Emphasis added.] And see the earlier remarks of Senator Reed (*supra*, p. 24) that it would be absurd to give the soldier an option to pay or not pay, as he sees fit. Cf. fn. 15 and *supra*, pp. 22, 24.

³³ "This change in the original contract of insurance is agreed to by requiring the soldier who wishes to take advantage of the bill to make an application, signed by the beneficiary when legally necessary. When the application is filed by the company, it also accepts the change in the contract." H. Rept. No. 181, *supra*, p. 7.

³⁴ The report speaks of the soldier obtaining a "Government *guaranty* upon an aggregate of [not] more than \$5,000 of insurance" (*ibid.*, p. 7); and states that the "*guaranty* continues as to all premiums on accepted policies until a year after the war * * *" (*ibid.*, p. 8). Speaking of the likelihood that the Government's financial burden will not be large, the report states, "In the first place the Government only *guarantees* the payment of the premiums. If the soldier dies the insurance company will get its premiums out of the policy and the Government's *guaranty* will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to his rights. * * * In the nature of things it is impossible to say what the amount of this liability will be. But it is plain that it will be very small, especially when we remember that the *guaranty* does not apply to more than \$5,000 of insurance on any one life." *Ibid.*, pp. 8-9. [Emphasis added.]

³⁵ See H. Rept. No. 344 (Conference Report to accompany H. R. 6361), 65th Cong., 2d Sess.

B. *The 1918 Act was construed administratively as a guaranty and as requiring reimbursement*

Although the word "guaranty" does not appear in the language of Article IV of the 1918 Act,³⁶ its provisions and the foregoing legislative history indicate beyond any doubt that the transaction envisaged by the Congress was one of guaranty, a concept which is, of course, familiar in the common law. The legislative background and the terms of the statute clearly indicate also that Congress was not bestowing a gratuity but was in fact contemplating reimbursement for the sums paid under the guaranty. This will be discussed more in detail elsewhere (*infra*, p. 44 *et seq.*). However, it is important at this point, before proceeding to the 1940 Act, to consider the administrative construction and operation of the 1918 Act, for it is familiar law that an administrative interpretation or practice "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U.S. 183, 193; *United States v. Citizens Loan Co.*, 316 U.S. 209, 214. Moreover, since Congress did not indicate any disapproval of that interpretation or make any relevant changes when the 1918 Act was reenacted in 1940, it must be presumed that Congress approved that interpretation (see *infra*, p. 56).

From the very outset, the 1918 Act was construed by the Treasury Department's Bureau of War Risk Insurance, which administered it, as providing a guar-

³⁶ As already noted (*supra*, p. 25), the word had been in the title of the revised separate insurance bill drafted by Dean Wigmore and the insurance industry representatives. The title was dropped, however, when that bill was inserted as Article IV of the Civil Relief Act.

anty.³⁷ It was so construed by the Bureau of the Budget and the President concurred.³⁸ That the Government was not bestowing a mere gratuity but was in fact contemplating reimbursement for sums expended is reflected in the application which servicemen were required to sign in order to obtain the benefits of the Act.³⁹ While the application is not

³⁷ *Memorandum Regarding Life Insurance of Men in Active Military Service under the Soldiers' and Sailors' Civil Relief Act*, (G. P. O. 1918), p. 3. This printed pamphlet distributed by the Treasury Department for the use and information of insurance officers in explanation of the Act states that the "Government will guarantee to the insurance company or organization the payment of premiums * * *." [Emphasis added.]

³⁸ In May 1922, President Harding transmitted to Congress a request for a \$25,000 appropriation for the Veterans Bureau to effect a settlement with the insurance companies in accordance with the final accounting provisions of the 1918 Act. House Document No. 308, 67th Cong., 2d Sess. Transmitted with the President's communication was a letter from the Director of the Bureau of the Budget, in which the President stated he concurred, which explained that the 1918 Act had provided for a "guarantee" of payment of premiums. The appropriation was passed by the Act of July 1, 1922, 42 Stat. 771.

³⁹ The application form, issued April 8, 1918 (T. D. 26 W. R.), is set out in full in *Regulations and Procedure, United States Veterans' Bureau (Active and Obsolete Issues as of December 31, 1928), Part I*, pp. 10-11. Included in that application signed by the insured were the following two paragraphs:

"I hereby apply for the benefits of Article IV of the soldiers' and sailors' civil relief act, with reference to the above-described insurance on my life. This application is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of such article.

"I agree that the United States shall be *reimbursed* for any money advanced on account of unpaid premiums on the above policy (with interest at the rate of 5 percent per annum), out of the above policy, in the event of death or maturity, and out of any cash value, in the event such premiums are not paid within one year after the termination of the present war or the termination of any period of military service, whichever date is the earlier." [Emphasis added.]

without some ambiguity as to whether such reimbursement is to be derived solely from the proceeds of the policy and its cash surrender value, its language certainly precludes the contention that a gratuity rather than a debt was contemplated. The agreement to reimburse necessarily carries with it an acknowledgment of a future obligation or debt of the insured to the United States. Otherwise, there would be no occasion for repayment. It was to assure such repayment that the Act provided for a lien to the United States, and the form of the application clearly gives a consensual or contractual basis for that lien, which would not be available at common law.⁴⁰

The Veterans Bureau subsequently reported to Congress that during the entire period the 1918 Act was in force, a total of 7,745 applications for insurance protection were received and approved. This represented life insurance in an amount in excess of \$12,500,000 and a guaranty by the United States of yearly premiums of over \$362,000. *Report of the United State Veterans' Bureau (1924)*, p. 445. (Compare the experience under the 1940 Act; see fn. 5, p. 14, *supra*.) Of this amount, servicemen ultimately paid their insurers all but approximately \$20,000. That is, roughly

⁴⁰ Regulation No. 21, promulgated February 26, 1919, also underscores the expectation of reimbursement. Sec. 406 of the 1918 Act prohibited any loan, settlement, or payment of dividend on a protected policy which might prejudice the security of the lien of the United States. Regulation No. 21 permitted a loan on the policy "only when the cash surrender value of the policy * * * would at all times be sufficient to satisfy the claims of the United States, already accrued or which may accrue under the provisions of the Act, and in addition thereto be sufficient for the payment of the new loan * * * ." *Regulations and Procedure, United States Veterans' Bureau (Active and Obsolete Issues as of December 31, 1928)*, Part I, p. 39.

95% of the premiums guaranteed were paid to the insurers directly by the insureds. Pursuant to its guaranty, the United States paid the small balance. Significantly, however, the Report informed Congress that some recoveries had in fact been made by the Bureau from the insureds to reimburse the Government for its outlay.⁴¹ *Ibid.* Despite appellants' attempt to minimize this (Op. Br., p. 56), the inescapable fact is that reimbursement *was* sought and *was* obtained, and Congress *was* advised of it.

C. *The legislative history of the 1940 Act*

1. With the advent of our national defense program following the outbreak of World War II and the accompanying enlargement of our armed forces, the need for servicemen's civil relief again became imperative. Most of the benefits of the 1918 Act were revived in the summer of 1940. By amendments to the National Guard Bill⁴² and the bill which became the Selective Training and Service Act of 1940,⁴³ the benefits were

⁴¹ "The precise extent of the Government's efforts to collect from insureds who permitted their insurance to lapse under conditions requiring the Government to pay to insurers the differences between the premiums with interest and the cash surrender value of the insurance is not known, but it is clear that, in the administration of the 1918 act, collections were effected in some cases. A list of at least 14 such cases is presently at hand. They reflect collections during the years 1923-24, and one such collection was made as late as October 8, 1925. For present purposes the amount of such collections and the extent to which efforts were made to effectuate them are matters of no importance. The significant thing is that they negative any idea or assertion that an administrative practice prevailed not to regard the insured as indebted to the United States." *Decisions of the Administrator of Veterans' Affairs*, No. 742, Supp. to Vol. 1, pp. 91, 98 (April 1, 1947).

⁴² 54 Stat. 858, 860 (approved August 27, 1940).

⁴³ 54 Stat. 885, 895-6 (approved September 16, 1940).

extended to persons brought into the armed forces under those statutes. These amendments in effect incorporated the 1918 Act by reference. But they expressly excluded the insurance and tax provisions of the 1918 Act.⁴⁴ None of the congressional committee reports relating to these bills discuss the exclusionary features of these amendments.

In mid-August 1940, bills sponsored by the War Department which in substance proposed a detailed reenactment (as distinguished from incorporation by reference) of the 1918 law were introduced.⁴⁵ These bills contained an article relating to commercial life insurance protection different from the 1918 law only with reference to the method of administration (see *supra*, fn. 25, p. 28. In their reports on the bills, both the Senate and the House Committees on Military Affairs referred to the insurance article as a *guaranty* and used no language suggesting a gratuity.⁴⁶ Apart

⁴⁴ Senator Overton, the sponsor of the amendments, explained that they were temporary in nature and that the War Department would soon draft a separate bill. 86 Cong. Rec. 10052, 10318, 10500.

⁴⁵ H.R. 10338, 76th Cong., 3d Sess., was introduced in the House by Representative May; Senator Overton introduced its counterpart, S. 4270, in the Senate. See 86 Cong. Rec. 10292; H. Rept. No. 3001, 76th Cong., 3d Sess., pp. 4-5.

⁴⁶ S. Rep. No. 2109, 76th Cong., 3d Sess., p. 3, explains with regard to the insurance provisions: "In the case of life-insurance policies, upon application by persons in the military services, the Administrator of Veterans' Affairs may *guarantee* payment of premiums in order to prevent lapsing or forfeiture of policies. Such persons may, within 1 year after leaving the military service, pay up premiums unpaid by them and resume payment of regular premiums. If they do not, the policy lapses and the cash surrender value accrues to the Government to the extent necessary to meet the cost of the premiums which it has *guaranteed*." H. Rept. No. 3001, 76th Cong., 3d Sess., p. 4, comparing the proposed bill with the 1918 law, states as to the insurance provisions: "The only

from the urgent need for enactment of the bill, there was little discussion on the floor of the Senate relating to the insurance provision before the respective bills went to conference to settle disagreements. (See 86 Cong. Rec. 12837.)

In the House, however, a very significant discussion occurred. The debate there reveals that it was the Congressional purpose—certainly the House's understanding—that the insurance provision of the proposed bill would not result in the conferment of a gratuity, but rather, would provide a period of suspension as to the payment of insurance premiums; that, just as in the case of other civil obligations of the serviceman, it provided for a temporary delay and not for a wiping out of the obligations accruing; that the Government would simply guarantee payment of defaulted premiums during that period of suspension; and that if the Government had to pay the premiums by reason of its guaranty, the serviceman would later be obligated to reimburse it for such payment. This debate is of such importance that we have set it out at some length in Appendix E, *infra*, pp. 97-100.

This discussion, despite some minor inaccuracies as to the technical aspects of the bill, dissipates any idea that Congress intended that Government payments of defaulted premiums were not to be reimbursed. On the contrary, it shows clearly that the only time the specific question came up in Congress those managing the bill stated the purpose and expectation to be that the recipients of the insurance protection would, at

change in this article relates to method of administration. In *guaranteeing* insurance premiums, certificates issued by the Veterans' Administration are used, instead of \$100 bonds issued by the Treasury Department." [Emphasis added.]

some later period, have to repay the Government for its expenditures.

Thereafter, the House and Senate bills went to conference. There, the Senate bill (S. 4270) was adopted with minor changes not relevant here. Since the Senate bill did not differ from the House bill in its insurance provisions there was no occasion for the conference report (H. Rept. No. 3030, 76th Cong., 3d Sess.) to comment on this aspect. The bill was enacted October 17, 1940, 54 Stat. 1178.

2. Because the 1940 Act was amended before the termination of World War II, there was hardly occasion for a fixed administrative construction or practice to become established. But, as in the case of the 1918 Act, the application form and the regulations issued under the 1940 Act speak of a *guaranty* and look toward the insured's reimbursement of payments which the United States might make under that guaranty. *E. g.*, see 38 C. F. R. (1941 Supp.) 10.3300, 10.3309, 10.3310; R. 293.

Nevertheless, in an attempt to rest their case on a settled administrative construction of the 1940 Act, different from that given to the 1918 Act on the question of reimbursement (*supra*, pp. 34-35), appellants stress the ambiguous statements of certain VA officials (App. Op. Br. pp. 35-6). These officials, when informally answering inquiries made by persons in the insurance field, replied that the Act did not have provision for reimbursement from the insured. They did not say that the insured would not be liable for repayment, but only that the Act did not provide for repayment. Actually, there was no express provision. But whatever inferences were drawn from these enigmatic replies, it has long been settled that the United States can

neither be bound nor estopped by the mistaken representations of its officials. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380; *United States v. Stewart*, 311 U.S. 60, 70; *Whiteside v. United States*, 93 U.S. 247, 257; *Lee v. Munroe*, 7 Cranch 366. The same principle nullifies appellants' reliance (Br. p. 32) on the Breining statement. See *Decisions of the Administrator of Veterans' Affairs*, No. 742 (April 1, 1947), Supp. to Vol. 1, p. 91; R. 62-94; *United States v. Nichols*, 105 F. Supp. 543, 550-1, 553 (N.D. Ia.). The first time the Veterans Administration took a formal position with reference to the 1940 Act on the point was in *Decisions of the Administrator*, No. 513 (March 1, 1943), Vol. 1, p. 781, and it was there determined that the insured is obligated to reimburse the United States. That decision was carefully reexamined and reaffirmed in *Decision No. 742, supra*; R. 62-94. Those decisions express the formal and considered position of the administrative agency.

D. *The legislative history of the 1942 amendment*

It is a firmly established principle of statutory construction that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger v. Western Investment Co.*, 221 U. S. 286, 309; *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 277; cf. *United States v. Hutcheson*, 312 U. S. 219; *Brown v. Duchesne*, 19 How. 183, 194. Accordingly, in seeking to determine the legislative purpose of the 1940 Act resort may properly be had not only to contemporaneous materials but to later legislative events as well.

Within a few months after enactment of the 1940 Act it became apparent that various of its provisions

needed amendment. A number of bills were introduced in the 77th Congress proposing changes with reference to different subjects covered by the Act.⁴⁷ A change in the insurance provisions was proposed by the Veterans Administration early in 1941. It transmitted to the Senate a proposed bill intended to clarify and liberalize Article IV of the 1940 Act and to eliminate much of the administrative work required under that law.⁴⁸ This proposal was later enacted into law. It specifically described the transaction as one of guaranty and it went on and made explicit what theretofore had been implicit, *viz.*, that the serviceman must reimburse his guarantor for its payment of his defaulted premiums (Sec. 406; now, 50 U.S.C. App. 546; *infra*, pp. 92-3; emphasis added):

Payment of premiums and interest thereon * * * becoming due on a policy while protected under the provisions of this article *is guaranteed by the United States*, and if the amount so *guaranteed* is not paid to the insurer prior to the expiration of the period of insurance protection * * * the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer * * * *shall become a debt due to the United States by the insured* on whose account payment was made and, notwithstanding any other Act, *such amount may be collected either by de-*

⁴⁷ See S. Rept. No. 1558, 77th Cong., 2d Sess., p. 1; H. Rept. No. 2198, 77th Cong., 2d Sess., pp. 1-2; 88 Cong. Rec. 5363.

⁴⁸ VA's letter of transmittal explaining the various proposed changes is set out in S. Rept. No. 716, 77th Cong., 1st Sess., pp. 4-6. The bill itself is set out at pp. 1-3 of the Report.

duction from any amount due said insured by the United States or as otherwise authorized by law.

The provisions of VA's proposed bill were substituted intact for those contained in a bill (S. 1372, 77th Cong., 1st Sess.) to amend Article IV which was then under consideration before the Senate Committee on Military Affairs. Recommending its enactment, the Senate Committee stated in its report:

The proposed amendment has been drafted in accordance with the suggestions of the Veterans Administration *for the purpose of clarification* and will not effect any substantial change in the basic purpose of the bill * * *.

The purpose of the proposed amendment is to substitute a more workable law and to avoid much of the administrative work required under Article IV as now enacted. It will *liberalize* the existing law * * *. ⁴⁹

The bill was promptly passed by the Senate and then was referred to the House Committee on Military Affairs. Meanwhile, a subcommittee of the latter had been appointed to study the numerous proposals to amend other aspects of the 1940 Act. As a result of its study, the subcommittee made a recommendation to the full committee in the form of a bill (H. R. 7029, and see H. Rept. No. 2198, 77th Cong., 2d Sess., pp. 1-2). This bill, too, contained a section stating that the payment by the United States of defaulted premiums shall constitute a debt due from the serviceman to the United

⁴⁹ S. Rept. No. 716, 77th Cong., 1st Sess., p. 3. [Emphasis added.]

States.⁵⁰ Following hearings on H. R. 7029, the House Committee revised that bill and caused to be introduced H. R. 7164, 77th Cong., 2d Sess. The latter bill omitted the section describing the transaction as a guaranty and the resulting accrual of a debt. The Committee Report recommending its passage, however, has no comment on the omission. H. Rept. No. 2198, 77th Cong., 2d Sess. And, although that Report (*id.*, p. 6) and the sponsors of the bill on the floor of the House (88 Cong. Rec. 5364-5366) freely refer to the transaction as a "guaranty", no reference was made to whether the serviceman is obligated to repay the Government for its payment of defaulted premiums.⁵¹

The House passed H.R. 7164 (88 Cong. Rec. 5373) and sent it to the Senate. There, by amendment on the floor, the Senate struck all of the insurance provisions from the House bill and substituted the provisions of the bill (S. 1372, *supra*) previously proposed by VA and enacted by the Senate. 88 Cong. Rec. 6705-6707.⁵² Following this amendment and passage by the Senate, the bill was sent to conference. There, the Senate's version (which, in turn, was VA's) of the amended insurance provisions was retained, some minor changes

⁵⁰ Sec. 409 of H.R. 7029. The bill is set out in full in *Hearings before the Committee on Military Affairs, H. Rep., 77th Cong., 2d Sess., on H.R. 7029*, pp. 1-7. The language of Sec. 409 of this bill is identical with the part of Sec. 406 of S. 1372 quoted above, pp. 40-1.

⁵¹ Cf. *Decisions of the Administrator of Veterans' Affairs, No. 742*, Supp. to Vol. 1, at pp. 102-103.

⁵² Senator Johnson (Colo.), the sponsor of the amendment, explained on the floor that "the purpose of the bill is *to make available additional and further relief and benefits* to persons in the military and naval forces, *and to clarify the original act*, which is known as the act of 1940. Most of the amendments are technical in nature. * * *." 86 Cong. Rec. 6707 (emphasis added).

being made. See H. Rept. No. 2481, 77th Cong., 2d Sess., p. 6 (Conference Report).⁵³ The bill was thereafter enacted and became law on October 6, 1942 (56 Stat. 769, 773).

Apart from the clarifying language describing the transaction as one of guaranty by the United States, with the servicemen being liable for reimbursement, among the liberalizing changes effected by the 1942 amendment were 1) the period of protection against lapse of policies was extended from one to two years following termination of military service; 2) the face value of policies protected was raised from 5 to 10 thousand dollars; 3) a beneficiary was given the right to apply for the Act's protection in case the insured was outside continental United States; and 4) the exclusion from the protection of the 1940 Act of policies as to which there was an outstanding loan equal to at least 50% of the cash surrender value of the policy was dropped. It also provided that the provisions of the 1940 Act shall remain in force with respect to applications for protection executed prior to enactment of the amendment. (The 1940 Act had set up transactions essentially contractual in nature and presumably Congress had no intention to alter them.) The amendment provided further that insur-

⁵³ In reporting and explaining to the House the action of the Conference Committee, Representative Sparkman, a member of that Committee, stated with regard to the payment of defaulted premiums by the United States: " * * * Under the House bill nothing was said about these amounts being claims against the person in the armed forces after he got out of the service. The Senate [bill] provides that they shall be a claim against him and shall be collected against any amounts that may become due him by the United States. The House accepted the Senate provision" (88 Cong. Rec. 7541).

ers, whose policies were protected under the 1940 Act, could choose to settle their accounts with the United States under the much simpler method of the 1942 Amendment.

The amendment did not, as appellants argue (Op. Br. p. 22 *et seq.*), work a substantial change in the whole scheme of insurance protection. As we have just noted (*supra*, p. 41), the Senate Committee declared that the amendment would *not* effect any substantial change in the basic purpose of the bill. That purpose, as the history of the 1918 Act demonstrates, was to create a transaction of guaranty. Nor did the 1942 Amendment result in any increase in appellants' liability. They were obligated under the 1940 Act to pay their defaulted premiums plus interest (see *infra*, p. 46 *et seq.*). That obligation was not modified or increased. The additional year's protection of their policy was one of the liberalizing features of the 1942 law as construed by VA; appellants were given full notice and could have discontinued that protection at any time had they wished to do so (R. 288).

III

The Insured Is Obligated to Reimburse the United States for Its Payment of Defaulted Premiums on His Behalf

From the foregoing review of the legislative history and of the language of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, these conclusions emerge: First, that the general purpose of the statute was to provide a temporary suspension of the enforcement of civil liabilities of servicemen during their period of military service, not a gratuitous dis-

charge of those liabilities.⁵⁴ Second, that one particular purpose of the insurance Article was to create a legally enforceable debt due and owing by the insured to his insurer for premiums falling due during the period his policy was to be protected under the Act. Third, that the transaction envisaged by the Act was one of guaranty, *viz.*, the United States undertook to pay the insured's debt if he failed to do so within the specified period. And fourth, that the Congress did not thereby intend to confer a gratuity upon the insured to the extent of any payments made by the United States pursuant to the guaranty, but on the contrary, Congress contemplated that the insured would reimburse the United States, and to that end even wrote into the Act security devices (such as the lien provision of Sec. 408) to assist in obtaining prompt reimbursement. In this point we will show that these purposes were in fact accomplished by the terms of the Act; that the insured is subject to a primary indebtedness for the defaulted premiums; and that the United States, as his guarantor who paid the debt on his behalf, is entitled to full reimbursement.

⁵⁴ This purpose of providing a suspension of remedies for a *temporary* period is stated in the first section of the Act (Sec. 100; *infra*, p. 81). In the words of Judge Lemmon: "Coming as they do at the very threshold of the statute, these Congressional declarations tincture the entire enactment. Every article, every section, every paragraph, every sentence is tinged with this 'temporary suspension' hue—unless a contrary legislative intent is plainly shown. No such contrary intent has been even intimated in any of the sections pertinent to the present lawsuit" (R. 110-111). The Act does not provide a discharge of liabilities. *Kerrin v. Kerrin*, 97 Cal. App. 2d 913, 218 P. 2d 1004.

A. *The insured is subject to a primary indebtedness for the defaulted premiums*

When an insured expressly requests an insurer to afford coverage during a specified period and the insurer pursuant to the request gives coverage, whether on the basis of the insured's personal credit or the added inducement of a guaranty by a third party, the insured is obligated to pay the insurer for the coverage so extended. In short, he has purchased insurance and must pay for it. Cf. *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 323; *Tarleton v. DeVeure*, 113 F. 2d 290, 295-6 (C.A. 9), certiorari denied, 312 U.S. 691. There is, therefore, no merit to appellants' argument (Op. Br. pp. 39-41) that, even though they applied to their insurer and received continued insurance coverage, they were not obligated to pay premiums to that insurer. See *United States v. Nichols*, 105 F. Supp. 543, 547 (N. D. Ia.), app. dism'd, 202 F. 2d 958; *Decisions of the Administrator of VA*, No. 742, Vol. 1, Supp. 1, at pp. 103-4 (R. 85-8). Article IV of the 1918 Act was specifically designed to create a legally enforceable obligation owing from the insured for premiums becoming due during his military service. As we have seen (*supra*, pp. 23-24), the whole basis of the objections advanced by the insurance industry against the bill originally introduced was that, under its terms, the insured had an option to pay or not to pay his premiums; that, since he had not requested renewal of his insurance contract, it was feared that the insurer would be unable to enforce payment of premiums at the termination of his military service. The optional nature of the

obligation was removed. As revised and passed, the Act contemplated—indeed, provided for—a binding primary obligation on the part of the insured to pay the premiums to the insurer, for it extended protection only when the insured expressly requested his insurer (through an application submitted *to the insurer*) to continue insurance coverage despite current default of premiums (the ultimate payment of which the Government guaranteed), and the insurer (by forwarding the application to the Government) agreed to do so. Sec. 401 (1), *infra*, p. 82.

The Government's part in the transaction was that of a guarantor. (See *infra*, p. 48 *et seq.*) The concept of guaranty necessarily implies the existence of a primary obligation. By definition a guaranty is a promise by one party to pay the debt of another (see fn. 55, *infra*, p. 48).

Further recognition in the Act of the primary nature of the obligation of the insured is the provision in Sec. 409, *infra*, p. 86-7, that, in the event of the death of the insured while the protected policy is in force, "the amount of any unpaid premiums, with interest at the rate provided in the policy for policy loans, shall be deducted from the proceeds of the policy" in payment to the insurer for such unpaid premiums. This provision directing self-payment by the insurer unquestionably infers an underlying debt of the insured. See also Sec. 410 ("If the insured does not within one year after the termination of his period of military service *pay to the insurer* all past due premiums with interest thereon * * * the policy shall * * * lapse * * *.") [Emphasis added.]

Moreover, the use of such phrases as "*defaulted*

premiums'' (Sec. 408), "*unpaid premiums*" (Sec. 409), "*past due premiums*" (Sec. 410), all indicate an obligation to pay. And this is underscored by the requirement that the premiums must be paid *with interest*, for the word "interest" imports an amount which one has contracted to pay for the use or forbearance of money; it normally does not apply to moneys which are payable at one's discretion (*Equitable Society v. Commissioner*, 321 U.S. 560, 564; *Deputy v. DuPont*, 308 U.S. 488, 498).

It is to be noted, finally, that nowhere in the Act is there any suggestion that this primary obligation of the insured is for anything less than the entire amount of the defaulted premiums plus interest at the policy loan rate.

B. Having paid the defaulted premiums as a guarantor, the United States is entitled to reimbursement from the principal debtor

The legislative history and the terms of the statute clearly demonstrate that the Act set up a transaction of guaranty.⁵⁵ Although that word is not used in

⁵⁵ A guaranty is a promise to pay if the one primarily liable for the debt does not. 24 Am. Jur. 873-874; 4 *Williston on Contracts* (Rev. Ed.), p. 3484. Being a collateral undertaking of another person, a guaranty imports the existence of two independent obligations: that of the principal debtor and that of the guarantor. 24 Am. Jur. 875-876. It differs from surety in that the surety is party to the original obligation, may be sued as a primary obligor jointly with the principal, and is unconditionally bound; in guaranty, the guarantor's liability is secondary and is conditioned upon default of the principal debtor and notice of such default. 24 Am. Jur. 879. Guaranty differs from indemnity in that the indemnitor's liability is primary and, in the normal situation, there is no privity or obligation between the parties to the indemnity contract and the third person (principal debtor) who causes the loss; in guaranty, there must be an obligation or privity between the creditor and the prin-

Article IV,⁵⁶ we have seen (*supra*, p. 24 *et seq.*) that the word “guaranty” was used repeatedly to describe and explain the transaction in the committee reports, in the legislative hearings, in the debates on the floor of the House and Senate, in the Regulations implementing the Act, in its administrative construction, and even in the title given to Article IV when it was proposed as a separate bill. This, as well as the entire context of the Article, permit no conclusion other than that the transaction involved was intended to be one of guaranty. The word has a definite and well known legal significance at common law. Congress is presumed to use terms in their recognized meaning at law. *Case v. Los Angeles Lumber Co.*, 308 U.S. 107, 115; *McNally v. Hill*, 293 U.S. 131, 136. Similarly, when Congress utilizes a transaction familiar to the common law, it must be presumed that Congress meant to ascribe to the transaction the same legal characteristics and the same consequences as would normally flow from such a transaction at common law. See, *e.g.*, guaranty—38 Ops. Atty.

principal debtor. See *Howell v. Commissioner*, 69 F. 2d 447, 448 (C.A. 8) certiorari denied, 292 U. S. 654; *United States v. Nichols*, *supra*, 105 F. Supp. at 556; 24 Am. Jur. 882-883. Under the Civil Relief Act the basic requisites of the formation of a contract of guaranty were present. Thus there was offer and acceptance (submission of applications to the VA and latter's approval); consideration (extension of insurance and deferment of lapsing the policy for failure to pay premiums currently); an independent promise or guaranty the U. S. undertook to pay premiums if the insured did not); there was provision for the creditor-insurer to give notice of default by the principal debtor-insured (through the monthly reports and final accounting), etc.

⁵⁶ Just as the word “contract” is not needed to constitute a contract, it is well settled that the presence or absence of the label “guaranty” is not decisive in determining whether a particular transaction is one of guaranty; instead, the transaction must be viewed in the light of its incidents, the attendant circumstances and the intentions of the parties. 24 Am. Jur. 876-877.

Gen. 75; 38 *id.* 319; insurance contract—*Ferguson v. Union National Bank*, 126 F. 2d 753, 759 (C.A. 4); *Fleetwood Acres v. FHA*, 171 F. 2d 440, 442 (C.A. 2); note—*United States v. Hansett*, 120 F. 2d 121, 122 (C.A. 2); mortgage—*HOLC v. Wilkes*, 130 Fla. 492, 178 So. 161.

It is, of course, an elementary rule of guaranty that where the guarantor, pursuant to his undertaking, has paid the indebtedness, the principal debtor is obligated to indemnify and reimburse the guarantor. The debtor's obligation to pay the debt is not extinguished by the guarantor's payment. Even in the absence of any express contract, he is impliedly bound to reimburse his guarantor. *Fidelity & Deposit Co. v. Hobbs*, 144 F. 2d 5, 8 (C.A. 10); *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 872 (C.A. 9); *Scott v. Norton Hardware Co.*, 54 F. 2d 1047, 1050 (C.A. 4); and see, *Howell v. Commissioner*, 69 F. 2d 447, 450 (C.A. 8), certiorari denied, 292 U.S. 654; 4 *Williston on Contracts* (Rev. Ed.), p. 3635; 24 Am. Jur. 956. Not only may the claim of the guarantor be based upon this implied contract of reimbursement, but it may also be based upon subrogation to the creditor's rights against the insured (the principal debtor). *Alexander v. Young*, 65 F. 2d 752, 756-757 (C.A. 10); *Scott v. Norton Hardware Co.*, *supra*, 54 F. 2d at 1051; *Howell v. Commissioner*, *supra*, 69 F. 2d at 451; 24 Am. Jur. 955-956.⁵⁷

⁵⁷ Additionally, since the insured, through his application, requested the United States to pay his premiums, recovery may be had on the basis of an implied assumpsit. *Metropolitan R'd v. Dist. of Columbia*, 132 U.S. 1, 12-13; 4 Am. Jur. p. 507.

C. *The remedies given to the United States by the Act supplement the common law remedy of reimbursement*

Appellants, and others who have sought to escape payment of their defaulted premiums, argue that even assuming that a transaction of guaranty was intended, the Act confers its own remedies upon the United States which replace the established common law remedy of reimbursement. In that connection, they refer to Section 408 which provides for the delivery by the United States of certificates to the insurer as security for the unpaid premiums with interest and then goes on to say that, "To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article," and further, that no loan, settlement, or dividend may be made or paid by the insurer "which may prejudice the security of such lien"; to Section 409, which provides that in the event of the insured's death, the defaulted premiums, with interest, shall be deducted from the proceeds of the policy and credited to the United States in the monthly report; and to Section 411, which provides that upon the final settlement between the insurer and the United States, the United States shall be given credit for the cash surrender value of the lapsed policy (to the extent of the unpaid premiums with interest).

This argument has been comprehensively examined and squarely rejected in *United States v. Nichols*, *supra*, and in *Decisions of the Administrator of VA*, No. 742 (R. 62-94). See also *Morton v. United States*, 113 F. Supp. 496 (E.D.N.Y.); *Decisions of the Administrator of VA*, No. 513 (March 1, 1943), Vol. 1, p. 781.

In the first place, each of these provisions is consistent only with a Congressional purpose that the burden of the premiums shall fall where in equity and good conscience, and under traditional legal principles, it belongs—upon the insured. As stated in the *Nichols* case, *supra* (105 F. Supp. at 547), they “tend to indicate that there was no intent on the part of Congress to provide gratuitous insurance.” They are in the nature of provisional remedies obviously intended to safeguard the reimbursement right of the United States; they assure to the United States that funds owed by the insurer to the insured will not be paid or dissipated unless the claims of the United States against the insured are first satisfied; they provide “a remedy about which there might otherwise be some difficulty with respect to procedure or with respect to exemption statutes” (*ibid.*).⁵⁸

Second, the lien provision necessarily imports a debt of the insured which has existence independent of the lien, for a lien is simply a security device; title to the property which is subject to the lien is not thereby vested in the lienor; a lien is only an encumbrance or a charge upon property for the payment of a debt. *Tobin v. Insurance Agency Co.*, 80 F. 2d 241, 243 (C.A. 8); *United States v. 1364.76875 Wine Gallons*, 60 F. Supp. 389, 392 (E.D. Mo.); 33 Am. Jur. p. 419. And the underlying debt which the lien secures must be for the entire amount of the insured's

⁵⁸ Submission of the application for protection by the insured and the insurer constituted their “consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article” (Sec. 401 of the 1940 Act; *infra*, p. 82-3).

obligation to the insurance company, which the United States undertook to pay if the insured did not. For the Section speaks of indemnifying the United States "against loss" *without qualification*. There is nothing in the lien section to suggest that the Government was to be indemnified merely *pro tanto* or to the extent of the cash surrender value only. Rather, the possible loss being secured against must relate to the subject of the sentence which immediately precedes the indemnity sentence in the same Section, *viz.*, the certificates delivered by the United States to the insurer as security "for payment of the defaulted premiums with interest," which represents the entire amount the United States had under risk of loss.

Third, to limit the reimbursement right of the United States solely to the statute's provisional remedies (of lien on the proceeds of the policy, or of credit for the cash surrender value, or of credit for premiums and interest on death) would be inequitable both from the viewpoint of the United States and from the viewpoint of servicemen. Instead of being uniform as to all servicemen, the reach of the remedy would vary from policy to policy. The widow, beneficiary, or estate of the serviceman who makes the ultimate sacrifice in line of duty would be liable, through the lien on the proceeds of the policy, for full payment of the unpaid premiums. On the other hand, those servicemen who, like appellee, survive would only be liable to the extent of the available cash surrender value on their policy, and of course that amount might be different in each case, some perhaps with no cash surrender value at all. And, whenever the cash surrender value is not

sufficient to meet the premium obligation, the United States would have no recourse for the deficiency.⁵⁹

But the manifest purpose of the statutory remedies was to provide security, to the extent available, against *any* loss by the Government. To confine the Government's rights to these remedies would invert that purpose to an intention to assure some loss because it would deprive the United States of the right to seek the deficiency. The admonition of the Supreme Court in *Shriver v. Woodbine Bank*, 285 U. S. 467, 478-479, is pertinent: "Here, the remedy provided [by the statute] is a summary and only partially effective supplement or alternative to that which the common law affords for enforcing the obligation

⁵⁹ "To hold that the insured is not indebted to the Government in such circumstances would produce results so inequitable and falling so unevenly upon those protected under the 1940 act that the intelligence and sense of fairness of Congress should not be impugned by ascribing to it such an intent unless no other conclusion can be drawn from the language of the act itself. For example, it would be possible, in that event, for an insured, whose policy had no cash surrender value or only such as accrued at no cost to him, to allow his insurance to lapse upon termination of the act's protection, thereupon pay nothing at all, and yet be free of all obligations. On the other hand, the act specifically requires another, who loses his life in service, to pay the premiums by having them deducted from the proceeds of the insurance. Still another who at the time of seeking the act's protection was insured under a policy possessing a cash surrender value—substantial in amount but not exceeding the unpaid premium—must lose even that which he had before entering service unless he pay the premiums. He cannot avoid such loss by having the Government step in and pay the insurer, and hence he cannot even delay the payment beyond the time provided. Finally, one who desires to continue the insurance in force after the act's protection ceases must pay the back premiums according to the terms of his policy, and this is so no matter what the cash surrender value may be." *Decisions of the Administrator No. 742, supra*, at pages 104-5 (R. 86-7). See also, *Morton v. United States*, 113 F. Supp. 496, 500.

to pay a sum certain * * *. The very fact that the remedy is on its face inadequate to compel full performance of the obligation declared, is persuasive that it was not intended to be exclusive of applicable common law remedies, by which complete performance might be secured." The Act's summary remedies are cumulative, not exclusive; they involve no inconsistency with the common law remedy of reimbursement, and it is a settled canon of statutory construction that a long established common law remedy is ordinarily not regarded as taken away by a statute except by express enactment or necessary implication, neither of which is present here. *Ibid.*; *United States v. Chamberlin*, 219 U. S. 250; *United States v. Stevenson*, 215 U. S. 190, 197-199; *King v. Pomeroy*, 121 Fed. 287, 290-293 (C. A. 8); and see *Perego v. Dodge*, 163 U. S. 160, 167-168.

An additional factor indicating that Congress intended that the United States should be reimbursed in full under the 1940 Act is stressed in the *Nichols* case, 105 F. Supp. at 558. The court noted that if those in the position of the present appellee were to escape reimbursement, the result would be that a group of servicemen would have been furnished with free insurance protection by the United States with commercial insurance companies. Yet, just nine days before passage of the Civil Relief Act of 1940, Congress had passed the National Service Life Insurance Act. Under that Act, servicemen had to pay for their insurance protection. It is hardly credible that Congress, after passing an act requiring servicemen to pay for government insurance, "would nine days later turn around and provide a certain group of service-

men with what in substance would be free insurance protection with commercial insurance companies, with higher premium rates.”⁶⁰

Finally, and this cannot be overlooked, Congress was aware that the 1918 Act had been construed administratively as a guaranty and as requiring the insured to make full reimbursement, for, in its final report to Congress relating to the 1918 Act, the Veterans Bureau had advised that some collections had been recovered as a reimbursement for payments under the guaranty (*supra*, p. 34-5). When Congress is aware of the manner in which a statute has been construed by the agency or officials charged with the duty of carrying its provisions into effect, and then reenacts that statute without evidencing any disapproval of that construction and without altering the relevant provisions, it must be presumed that the construction met with the approval of Congress. *United States v. G. Falk & Brother*, 204 U. S. 143, 150-152; *United States v. Philbrick*, 120 U. S. 52, 58-59. It is assumed that Congress would have effected explicit changes if it disagreed with that construction. *National Lead Co. v. United States*, 252 U. S. 140, 145-146; *United States v. Bailey*, 9 Pet. 238, 255-256; cf. *United States v. Cerecedo Hermanos*, 209 U. S. 337, 339; *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Missouri v. Ross*, 299 U. S. 72, 75; *Commissioner v. Flowers*, 326 U. S. 465, 469. It follows that the

⁶⁰ Premiums were also required to be paid on insurance issued by the Government under the War Risk Insurance Act during the first World War. See also *Decisions of the Administrator of VA*, No. 742, Vol. 1, Supp. 1, at pp. 105-106 (R. 88-9).

Agency's construction of the 1918 Act received legislative acquiescence.⁶¹

IV

No Express Statutory Authority Is Necessary for the United States to Recover Reimbursement from Appellants

The underlying basis for most of appellants' argument in their Opening Brief (*e.g.*, pp. 11, 21, 27) is their contention that they are not liable for reimbursement because there is no express language to that effect in the 1940 Act, and that Congress failed to provide a specific plan for fixing the amount of recovery from the insureds thus indicating a Congressional intent that payments by the United States be a bounty or gratuity. The contention rests primarily on two cases: *United States v. Hendler*, 123 F. Supp. 383 (D. Colo.) and *Hormel v. United States*, 123 F. Supp. 806 (S.D. N.Y.).⁶² *Hendler* was an action by the United States to obtain reimbursement for its payment of the insured's defaulted premiums under the 1940 Act. Since the *Hendler* decision rests solely on *United States v. Gilman*, 347 U.S. 507, which appellants rely on here,

⁶¹ Further evidence that the Congress considered the 1940 Act, as originally enacted, as imposing a debt or obligation upon the insured to reimburse the Government for any amount expended in his behalf appears in the Act of April 3, 1948, 62 Stat. 160, amending Sec. 406 of the 1942 Amendment by adding these words (now in 50 U.S.C. App. 546):

Any money received as repayment of *debts* incurred under this article [IV], *as originally enacted* and as amended, shall be credited to the appropriation for the payment of claims under this article. [Emphasis added.]

⁶² *Hendler* is now pending on appeal in the Tenth Circuit; a notice of appeal to the Second Circuit has been filed in *Hormel*.

we will discuss the inapplicability of *Gilman*. We will then discuss *Hormel*, the facts and issues of which are parallel to those in the instant case.

A. *The Gilman decision is not applicable to the present case*

In the *Hendler* case the district judge stated that, "upon moral grounds I am in full accord with the result of the decision" in *United States v. Nichols*, 105 F. Supp. 543 (N.D. Ia.) where, in an action for reimbursement, it was held that the United States is entitled to recovery under common law principles. The judge ruled, however, that the theory of the *Nichols* case had been rendered unavailable by the later decision in *Gilman*, a case in which no question whatever relating to the Civil Relief Acts was involved. Relying on *Gilman*, the *Hendler* judge ruled that reimbursement must be denied because Congress "had expressed no 'position' concerning the personal liability of a soldier for indemnification or reimbursement" (123 F. Supp. at 384). This holding, which appellants advance here, disregards the long established rule that no specific statutory authorization is required for the judicial enforcement of the contractual or other property rights of the United States. It substantially misconceives and misapplies the *Gilman* decision. And, it fails to perceive that the provisional remedies for reimbursement set forth in the Act demonstrate a Congressional "position" to require reimbursement.

1. The Supreme Court held, as early as 1818, that no express statutory authority is necessary to enable the United States to recover for a breach of contract, since "It would be strange to deny to them [*i. e.*, the

United States] a right which is secured to every citizen.” *Dugan v. United States*, 3 Wheat. 172, 181. In *Cotton v. United States*, 11 How. 229, 231-232, where a statute provided a criminal penalty for cutting timber on public lands but prescribed no civil remedy, the Court, affirming the right of the United States to bring an action of trespass, declared, “It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they [*i. e.*, the United States] were not entitled to the same remedies for their protection. * * * [A]s a corporation or body politic they may bring suits to enforce their contracts and protect their property.” See also, *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 550; *United States v. Standard Oil Co., of California*, 332 U. S. 301, 315, fn. 22. This rule applies not only in actions on express contracts and in tort but also in actions based on various quasi-contractual obligations or contracts implied in law. Examples, among many, include the right of the United States to recover money paid by it under a mistake of law or fact (*e. g.*, *Wisconsin C. R. R. Co., v. United States*, 164 U. S. 190); the right of the United States as drawee of a check to recover money paid on a forged endorsement (*e. g.*, *Clearfield Trust Co., v. United States*, 318 U. S. 363; *United States v. National Exchange Bank*, 214 U. S. 302); and the right of the United States to set aside transactions for fraud (*United States v. San Jacinto Tin Co.*, 125 U. S. 273, 279-285). The right to maintain suit to establish and safeguard the Government’s contract and property interests is an inherent power of the United States. It “is independent of statute” (*United*

States v. Bank of Metropolis, 15 Pet. 377, 401; *United States v. California*, 332 U. S. 19, 26-27).

2. The decision in *United States v. Gilman*, *supra*, certainly cannot be read as discarding this basic precept expounded more than a hundred years ago and emphatically reiterated through those years in a wealth of Supreme Court cases. In the *Gilman* case the Court was presented with a problem raising policy questions with unique implications under a particular statute whose purpose, history, and provisions are entirely unlike the one at bar. The question there presented was whether the United States, having been held liable for the negligence of its employee in a suit under the Federal Tort Claims Act (28 U.S.C. 1346 (b), 2671 *et seq.*), could recover indemnity from that employee. The Court placed great stress on the disciplinary effect of such a suit upon those who make government service their career.⁶³ It pointed to the potential heavy financial burden involved and underscored the probable effects on morale, on seniority, and on the promotion and demotion possibilities of the employee. 347 U.S. at 509-510. The absence of an expression of Congressional position on these delicate, complex, and wholly internal policy questions was mentioned as an added reason for denying recovery.⁶⁴ The

⁶³ "When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself." 347 U.S. at 510.

⁶⁴ The Court also pointed to the Tort Claims Act provision making a judgment against the United States a bar to an action against the employee (28 U.S.C. 2676) and to certain explanatory statements at Congressional hearings, which, if anything, indicated a Congressional position opposed to indemnity. 347 U.S. at 511, fn. 2.

Court, however, distinguished cases involving “an established type of liability” (*id.* at 509) as not requiring specific statutory sanction.

Here, we are dealing with such an established type of liability, *viz.*, the debtor’s obligation to reimburse his guarantor. Moreover, the unique considerations involved in *Gilman* militating against recovery certainly are not involved here. In *Gilman*, the Court was construing a statute whose overriding purpose was to impose liability upon the United States for torts committed by its employees while acting in furtherance of Government business, a liability which every employer has.⁶⁵ The broad purpose of the Civil Relief Act is not to assume the obligations of servicemen or to effect the discharge of their debts, but merely to accomplish a temporary postponement of those obligations, none of which were incurred by reason of government employment. Appellants are not government employees whose activity on behalf of the United States and in furtherance of its affairs subjected them to an obligation for which the United States, under moral or legal grounds, is vicariously liable. To the contrary, appellants’ obligation for defaulted insurance premiums arose out of their private affairs, stems from contracts they executed for their personal protection before they joined the armed forces, contracts which were continued in force at their own election, essentially for their own benefit, and which obligated them for a liquidated amount known to them at all times and presumably fitted to their civilian ability to

⁶⁵ The liability of the United States under the Tort Claims Act is conditioned upon the employee’s tort being committed “while acting within the scope of his office or employment” (28 U.S.C. 1346 (b)), and is subject to numerous exceptions (*id.*, 2674, 2680).

pay. Enforcement of that obligation involves no problem of discipline or morale or internal federal relationships.⁶⁶ Thus, the crucial factors in *Gilman* clearly are not present here.

3. But even if the *Gilman* decision has application beyond the Federal Tort Claims Act, the requirement it suggested—that Congress must indicate its position on policy—is met here. Our discussion of the Civil Relief Acts of 1918 and 1940, particularly of the provisional remedies afforded the United States under Article IV, discloses a Congressional position that the insured is not to receive insurance gratuitously and that the United States should be able to recover the defaulted premiums paid on his behalf. The lien and cash surrender value provisions of the Act reach funds owed by the insurer to the insured, and divert those funds to the United States unquestionably for the single reason of making the United States whole. At times these provisions may result in full reimbursement; at times they will not. But certainly, in the face of these provisions, it cannot be said that Congress has not taken a position on the question of indemnification or reimbursement. *The funds reached are those belonging to the insured.* By the clearest implication, these provisions show that Congress intended that the insured reimburse the United States; “what is clearly implied is as much a part of a law as what is expressed.” *Luria v. United States*, 231 U.S. 9, 24; *South Carolina v. United States*, 199 U.S. 437, 451; *McHenry v. Alford*, 168 U.S. 651, 672.

⁶⁶ Indeed, to give appellants “a free ride” in their private insurance (see R. 110) would surely have a deleterious effect on their fellow servicemen because of the resultant inequities. See *supra*, p. 54.

B. *The Hormel decision is erroneous*

The theory of the *Hormel* decision ^{66a} is essentially the same as the *Hendler* decision, being based on the supposed failure of Congress to take a position as to the amount which the insured must pay as reimbursement. The *Gilman* case, however, was not mentioned. In *Hormel*, the district judge stated that the Government's claim must be based upon a guarantor's implied right of reimbursement; that the guarantor may recover only the amount which he is required to pay under the guaranty; but that under the 1940 Act there is no way of determining how much of the total paid by the Government to each insurer is attributable to a particular insured (123 F. Supp. at 812). He noted that "there could be a disparity" between the amounts paid by the Government to the insurers and the amounts which the Government was seeking to collect from the insureds through reimbursement, with a resultant "profit" to the Government. Through a series of hypotheticals he suggested that the disparity resulted from the fact that (a) the insured was liable to the insurer for the defaulted premiums plus interest at the policy loan rate, usually 5% or 6%, but the Government was liable to the insurer for the premiums plus interest fixed by the Secretary of the Treasury

^{66a} In *Hormel*, plaintiffs sued to recover special dividends on their [Government] National Service Life Insurance policies. The United States defended by contending it was entitled to setoff against the dividends due the plaintiffs the sums owed by them for the defaulted premiums on their private policies which the United States had paid on their behalf pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

at only 3% ; ⁶⁷ and (b) the accounts between the various insurers and the United States were to be settled on a lump-sum-basis rather than on a per-policy-basis, making it difficult to trace the exact share attributable to a particular policy. He concluded that the failure of Congress to set out in the Act a specific plan for computing the amount owed by a particular insured “demonstrates that Congress did not intend that there should be any recovery from the insured” (123 F. Supp. 812). Appellants rest their appeal almost wholly on the *Hormel* decision (Op. Br. p. 11).

There are several reasons why the *Hormel* decision is wrong. In the first place, the Act does indicate the amount for which the insured is liable; it clearly contemplates that the insured is to pay the defaulted premiums plus interest at the policy loan rate. Thus, the amount specified for deduction from benefits payable in the event of the insured's death while the policy was protected (which amount was to be credited to the United States) is “any unpaid premiums, with interest at the rate provided for in the policy for policy loans” (Sec. 409); and on settlement, the cash surrender value not to exceed unpaid premiums with interest at the policy loan rate were to be credited to the United States (Sec. 411). This is the same amount which had to be paid to the insurer if the insured de-

⁶⁷ The certificates delivered by the Government to the insurer on the basis of the “monthly differences” as security for the defaulted premiums were to bear interest at a rate to be prescribed by the Secretary of the Treasury (see *infra*, p. 86). It so happened that the rate was fixed at 3 percent, 38 C.F.R. (1941 Supp.) 10.3312, but Congress could not possibly have known at the time of passage of the Act the rate which the Secretary would fix and thus could not anticipate any disparity. This would seem to undermine the rationale of the *Hormel* opinion.

sired to keep the policy in force following the period of protection (Sec. 410).

Certainly the plan provided by the 1940 Act (Section 406) in the form of Monthly Difference Reports on which the name of each policyholder, the amount of any premiums not paid by him when due, and the amount of any premiums paid in his behalf (even those deducted from the proceeds on maturity, as provided in Section 410) would enable any layman to determine the amount payable by the Government in a particular case. In this connection, it will be noted that Section 411 requires that in arriving at the balance due by the Government on final settlement the records on each "case" be examined so that no policyholder would be charged "a greater amount * * * than the total of the unpaid premiums with interest" against the cash surrender value of *his* policy. Thus, so far as an individual policyholder is concerned, the fact that any portion of his unpaid premiums was secured and represented by outstanding certificates issued on the basis of Monthly Difference Reports which also included amounts due by others is of no consequence whatever. In *Hormel*, the judge apparently did not realize that so far as a matured policy was concerned (Section 410), the effect of payment of the premiums and interest from the policy proceeds eliminated that policy from the settlement procedure of Section 411 and in no way could affect the amount required to be disbursed on account of any other policyholder.

Second, it is by no means certain that any disparity adversely affecting the insured would have resulted from the payment by the Government of the 3% interest on certificates. For, the Government had to

pay this interest from the date of issuance of the certificates until one year after the Act ceased to be in effect (Secs. 407, 411, 604); the insured was charged with the policy loan rate on defaulted premiums, 5 or 6%, but *for the shorter period* ending not later than one year after separation from service (or two years under the 1942 Amendment). Thus, the aggregate interest paid by the Government might have exceeded the amount it could collect from the insured.

In any event, the insured's obligation to the insurer was for the full amount of unpaid premiums and interest at the policy loan rate, as above pointed out, whereas although the Government fully discharged that obligation, the insured was actually called upon to pay such indebtedness, *less cash surrender value of his policy*. (Section 411 plainly provides that the cash surrender value of *each policy*, not to exceed defaulted premiums plus interest *on such policy*, was to be credited against the Government's liability on the guaranty.) But an insured not paying premiums during his period of service and two years thereafter did not contribute to the cash surrender value *which nevertheless accumulated during that period* (the Government received credit for the enhanced amount at settlement), hence, to the extent it was created or enlarged during such period, the insured lost none of his own money by its application to reduce the amount payable to the insurer on final settlement pursuant to the Act's provisions. As a matter of absolute fact he gained thereby. The point is that the insured is never charged, on final settlement, the full amount of the defaulted premiums with interest at the policy loan rate but only the difference between such sum and the cash surrender value—to

the latter of which, in most instances, he made little or no contribution whatever.

Clearly illustrating this point is the record maintained by VA covering the protected policy involved in the *Hendler* case, 123 F. Supp. 383 (but which was not before the court when the *Hendler* case was disposed of by motion). We have set out a brief extract of this record in Appendix F, *infra*, p. 101. The record shows that Hendler paid his insurer only 1/4th of his first \$213.25 annual premium (amounting to about \$53 for the period January-March, 1942) before his policy was brought under the protection of the Act. By the time the protection ended, however, the cash surrender value (enhanced by virtue of the Government's guaranty) *had increased to \$80.5*. That value, which was more than fifteen times his initial and only payment to the insurer, was credited toward his debt to the insurer on final settlement.

Third, while it is true that a guarantor's right of reimbursement is normally limited to his net outlay, there is no reason why, in the absence of any over-reaching, the agreement between the parties cannot provide otherwise. The transaction of guaranty is one of contract and, like any contract, its terms determine the ultimate rights. Here, the terms and conditions of the 1940 Act (not the application *alone*, as appellants seem to urge) spelled out the conditions under which the Government would undertake to guarantee the defaulted premiums. From the very outset, all parties to the transaction were charged with knowledge of the accounting and settlement provisions of the Act, the possibility of a difference in the interest rates, and the possible "profit" to the Gov-

ernment. The insured as well as the insurer went forward, the insured presumably aware of the possible "profit," and the insurer knowing that if it pursued the guaranty it would recover interest at the rate of 3 percent instead of 5 or 6 percent. As to the insurer, it was obtaining a guaranty from one whose credit and whose terms of easy payment under the guaranty warranted a reduction in the interest rate. As to the insured, the situation is hardly different from the usual surety situation where the surety company charges a fee for its undertaking; indeed, the Government frequently charges a fee for its guaranty, perhaps the most common situation being the $\frac{1}{2}\%$ charge in connection with private home mortgages guaranteed by the Federal Housing Administration. Congress may have contemplated that any difference in interest rates between that paid on certificates and that provided for policy loans should be retained by the Government against its contingent liabilities under the Act.

Fourth, if the normal rule against the guarantor making a "profit" cannot be altered by contract, there surely is no reason why it cannot be modified by statute, particularly since the statute does not increase the insured's original or primary obligation.

Fifth, a corollary to the normal rule is that the guarantor is entitled to be reimbursed for all expenses reasonably incurred by him in connection with his undertaking. *Restatement of Restitution*, Sec. 80 (b); 4 *Williston on Contracts* (Rev. Ed.), p. 3666. The possible disparity referred to in *Hormel* may be said to reflect and to offset, at least in part, the Government's expenses in connection with the entire undertaking under Article IV of the Act. The experience under the

1918 Act where a deficiency appropriation was necessary (*supra*, fn. 38, p. 33), the anticipation that reimbursement collections would not be possible in all cases, the administrative expenses involved, all suggest that Congress may have intended to spread the burden of costs through the system adopted.

Finally, bearing in mind appellants' argument that the Government's only remedy is the "lien on the policy, nothing more" (App. Op. Br. p. 43), it becomes obvious that if appellants' argument and the *Hormel* reasoning were to prevail, that remedy, too, would have to be held to be a nullity. Thus, appellants, following *Hormel*, argue that the United States is limited in reimbursement to the precise amount it pays to the insurer on behalf of the insured; that, due to the "profit" factor and the method of settlement, such amount is not ascertainable; and that the failure of Congress to provide a plan to determine that amount, they say, shows that Congress never intended to require reimbursement in any amount. *But, by parity of reasoning, the Government would be similarly precluded from exercising the remedy of the lien. For, under appellants' argument, there would be no way of determining the amount due the United States in enforcing the lien.* There would be no method of determining how much of the cash surrender value, available to the United States through the lien, can be applied to liquidate the Government's claim against the insured; in fact, every argument appellants and the *Hormel* opinion make with reference to the impossibility of ascertaining the amount of the Government's claim would also apply in determining the amount of the lien. The lien is a charge on the policy to the

extent of that claim, and if the extent of the claim cannot be ascertained, neither can the extent of the lien. Thus, to adopt appellants' argument and the *Hormel* reasoning would nullify the statute's remedy of lien, and would leave the Government with no remedy at all, a manifest distortion of Congressional purpose. The short of it is that appellants' argument and the *Hormel* decision are erroneous.

V

The Government Had the Right to Offset Appellants' Indebtedness Against the Dividends

Appellants assert, as they did below, that even if the Government is entitled to reimbursement, it is prohibited by 38 U.S.C. 454a (*infra*, p. 96) from offsetting their indebtedness under the Civil Relief Act against their NSLI dividends. This argument has been so effectively disposed of by Judge Lemmon below (R. 119-123; 123 F. Supp. at 597-9) and by the *Administrator's Decision No. 742* (R. 89-84) that little need be added.

1. Unquestionably, the United States has the same right, "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him." *Gratiot v. United States*, 15 Pet. 336, 370; *United States v. Munsey Trust Co.*, 332 U.S. 234, 239; *McKnight v. United States*, 98 U.S. 179, 186. The rule may be overridden only when a statute unequivocally provides otherwise. Sec. 454a does exempt certain veterans' benefits from set-off, but there is an exception to that exemption.⁶⁸ That exception permitting the offset of "overpay-

⁶⁸ Sec. 454a bars "the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans * * * of any claim of the

ments" made under laws relating to veterans, is applicable here. It has been the consistent administrative construction of this section that an "overpayment" includes anything of value which a veteran obtains under color of laws relating to veterans, that "if the Government pays a veteran's obligation pursuant to law and the veteran refuses to pay the debt therefrom arising, he is in a very real sense overpaid and there is an overpayment within the meaning of the exemption statute" (R. 122; *Administrator's Decision No. 742, supra; id., No. 607* (Nov. 24, 1944), Vol. 1, pp. 1097, 1101). The administrative construction is "not to be overturned unless clearly wrong" (*United States v. Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *United States v. Jackson*, 280 U.S. 183, 193). Far from being wrong, the construction is both reasonable and equitable. Moreover, Sec. 406 of the 1942 Amendment (described in Congress as a *clarifying* measure) provides specifically for offset.

2. Appellants argue (Op. Br. p. 72-3) that insurance protection was not a "payment" to the insured, that they were entitled to it as a matter of right. But their application for protection was in effect a request that the Government guarantee payment of their premiums, and when the Government, pursuant to that guaranty, paid their defaulted premiums, such payment was made on their behalf and it discharged their obligation to the insurer. It is little short of ludicrous to argue that payment to another under such circumstances was not, to all intents and purposes, a payment to appellants. This was an overpayment even within the dictionary

United States * * * against * * * any beneficiary * * * *except* amounts due the United States by such beneficiary * * * by reason of *overpayments* or illegal payments made under such laws relating to veterans, to such beneficiary * * * ." [Emphasis added.]

definition of the word relied on by appellants, for appellants were entitled (as a matter of right) to a moratorium, but not to have the Government itself gratuitously assume and discharge their obligations; to obtain a gratuitous discharge of their indebtedness to the insurer would be to obtain compensation or reward "beyond deserts" (see *id.*)

3. The history of Sec. 454a is reviewed in *Administrator's Decision No. 742, supra* (R. 89-94), and in *No. 607, supra*. There is no need to repeat it here. Examination of that history does not contradict, rather it forcefully fortifies, the decision below on the offset point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1955.

APPENDICES

APPENDIX A

The Soldiers' and Sailors' Civil Relief Act of 1918 provides in pertinent part as follows (40 Stat. 440, 444-447):

ARTICLE I

GENERAL PROVISIONS

SEC. 100. That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war.

* * * *

ARTICLE IV

INSURANCE

SEC. 400. That in this Article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission

to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article.

SEC. 401. That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits.

SEC. 402. That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their

terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy.

SEC. 403. That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this Article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval.

SEC. 404. That when one or more applications are made under this Article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more

policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately notify the insurer and the insured in writing of such selection.

SEC. 405. That no policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this Article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided*, That in no case shall this prohibition extend for more than one year after the termination of the war.

SEC. 406. That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, for the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been

applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference.

SEC. 407. That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer.

SEC. 408. That the Secretary of the Treasury shall, within ten days thereafter, deliver each

month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided*, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligation on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance.

SEC. 409. That the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained.

SEC. 410. That in the event that the military

service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

SEC. 411. That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war.

SEC. 412. That at the expiration of one year after the termination of the war there shall be an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited

to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

SEC. 413. That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article.

SEC. 414. That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

SEC. 415. That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service.

APPENDIX B

The Soldiers' and Sailors' Civil Relief Act of 1940 provides in pertinent part as follows (54 Stat. 1178, 1179, 1183-1186; 50 U. S. C. App. (1940 Ed.) 510, 540-554):

ARTICLE I

GENERAL PROVISIONS

SEC. 100. In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

* * * * *

ARTICLE IV

INSURANCE

SEC. 400. In this article the term "policy shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance

arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this article.

SEC. 401. (1) The benefits of this article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Administrator of Veterans' Affairs. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration.

(2) The Veterans' Administration shall issue through suitable military and naval channels a notice for distribution by appropriate military and

naval authorities to persons in the military service explaining the provisions of this article and shall furnish forms to be distributed to those desiring to make application for its benefits.

SEC. 402. The benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before the date of approval of this Act or not less than thirty days before entry into the military service; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy.

SEC. 403. The Veterans' Administration shall, subject to regulations, which shall be prescribed by the Administrator of Veterans' Affairs, compile and maintain a list of such persons in military service as have made application for the benefits of this article, and shall (1) reject any application for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section 402; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of

this article. Said Administration shall immediately notify the insurer and the insured in writing of every rejection or approval.

SEC. 404. When one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Veterans' Administration shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said Administration shall immediately notify the insurer and the insured in writing of such selection.

SEC. 405. No policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided*, That in no case shall this prohibition extend for more than one year after the date when this Act ceases to be in force.

SEC. 406. Within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the date when this Act ceases to be in force every

insurance corporation or association to which application has been made as herein provided, for the benefits of this article, shall render to the Veterans' Administration a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month.

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this article, which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default.

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or someone on his behalf in whole or in part during the preceding calendar month.

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Veterans' Administration has, since the date of such report, rejected an application for the benefits of this article. The final sum so arrived at shall be denominated the monthly difference.

SEC. 407. The Administrator of Veterans' Affairs shall verify the computation of monthly difference reported by each insured and shall, within ten days thereafter, deliver each month to the proper officer of such insurer, a certificate in the amount of the monthly difference certified in respect of each insurer. Such certificate shall be signed by said Administrator in the name of the United States, shall be in such form as the Administrator shall determine, shall be payable to the insurer within sixty days after the approval of the statement of account, as provided in Section 411 hereof, and shall bear interest at a rate to be prescribed by the Secretary of the Treasury, payable with the principal. Such certificate shall not be transferred except with the approval of said Administrator and shall remain with the insurer until settlement is made in accordance with this article.

SEC. 408. The certificate so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Veterans' Administration must be obtained.

SEC. 409. In the event that the military serv-

ice of any person being the holder of a policy receiving the benefits of this article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

SEC. 410. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service when this Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after the date when this Act ceases to be in force.

SEC. 411. At the expiration of one year after the date when this Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security under this article, together with accrued interest to the date of the account, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in Section 410, but not in any case a greater amount on

any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

SEC. 412. The balance in favor of the insurer in each case shall be certified by the Administrator of Veterans' Affairs to the Secretary of the Treasury, who shall pay to the insurer the amount thereof, which is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, upon the surrender by the insurer of the certificates delivered to it from time to time by the Administrator of Veterans' Affairs under the provisions of this article.

SEC. 413. This article shall not apply to any policy which is void or which may at the option of the insured be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

SEC. 414. This article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special was risk of those insured persons who are in military service.

* * * * *

ARTICLE VI

ADMINISTRATIVE REMEDIES

* * * * *

SEC. 604. This Act shall remain in force until May 15, 1945: *Provided*, That should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter: * * *

APPENDIX C

The 1942 Amendment of the Soldiers' and Sailors' Civil Relief Act of 1940 provides in pertinent part as follows (56 Stat. 769, 773-776; 50 U.S.C. App. 541-548):

SEC. 13. Article IV of such Act is amended to read as follows:

ARTICLE IV

INSURANCE

* * * * *

SEC. 401. The benefits and privileges of this article shall apply to any insured, when such insured or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article

shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed \$10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of \$10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed \$10,000, and a policy which affords the best security to the Government shall be given preference.

SEC. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Veterans' Administration concerning the pol-

icy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy.

SEC. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest.

SEC. 404. No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Veterans' Administration. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Veterans' Ad-

ministration. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article.

SEC. 405. In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy brought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Administrator of Veterans' Affairs.

SEC. 406. Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The

amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law.

SEC. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article.

SEC. 408. (1) The provisions of this article in force immediately prior to the enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 (hereinafter in this section called "such provisions") shall remain in full force and effect with respect to all valid applications for protection executed prior to the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942 and all policies to which such applications pertain shall continue to be entitled to the protection granted thereby.

(2) Any insurer under a policy accepted under

such provisions shall, subject to the approval of the Administrator of Veterans' Affairs and upon complete surrender by it to the United States, within ninety days after the date of enactment of the Soldiers' and Sailors' Civil Relief Act amendments of 1942, of all certificates issued in accordance with such provisions together with all right to payment thereunder, be entitled to the guarantee of unpaid premiums and interest thereon and the mode of settlement for such policies as provided by this article, as amended. The privileges and benefits granted by the foregoing sentence shall be in lieu of the method of settlement, and the requirement for accounts and reports prescribed by such provisions. In the event any such insurer fails to surrender within the said ninety days all such certificates and rights to payment, the accounts, reports, and settlements required to be made by such insurer under such provisions shall continue to be made as required and shall be governed by such provisions.

APPENDIX D

Other statutes relevant to this case are as follows:

1. 38 U.S.C. 11a-2 provides:

§11a-2. *Finality of Administrator's decisions on questions concerning claims for benefits or payments.*

Notwithstanding any other provisions of law, except as provided in sections 445 and 817 of this

title, the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.

2. 38 U.S.C. 445 provides in pertinent part as follows:

§445. Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. * * *.

* * * * *

The term "claim", as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim by the Administrator of Veterans' Affairs or someone

acting in his name on an appeal to the Administrator. * * *.

3. 38 U.S.C. 454a provides:

§454a. Assignability and exempt status of payments of benefits.

Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments.

From and after October 17, 1940, this section shall be construed to prohibit the collection by set-off or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (a) any person other than the indebted beneficiary of his estate; or (b) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws relating to veterans, to such beneficiary or his

estate or to his dependents as such: *Provided, however,* That if the benefits be insurance payable by reason of yearly renewable term or of United States Government life (converted) insurance issued by the United States, the exemption herein provided shall be inapplicable to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness be in the form of liens to secure unpaid premiums, or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits: *Provided further,* That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title.

4. 38 U.S.C. 817 provides:

§817. *Suits in event of disagreement as to claims.*

In the event of disagreement as to any claim arising under this subchapter, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title.

APPENDIX E

The following is an extract from the Congressional Record (86 Cong. Rec. pp. 13132-13133) concerning the bill which became the Soldiers' and Sailors' Relief Act of 1940. The bill (H. R. 10338) having been read

to the House, this discussion took place (emphasis added):

Mr. VOORHIS of California:

Mr. Speaker, * * * it seems to me that this bill ought to be as thoroughly understood as possible.

I do not propose to make an oration here, but I do propose to try to interpret the bill as I understand it, with the request that I be corrected as I go along.

I am afraid there are many Members of the House and there may be men who are going to be affected by the terms of this bill who are not going to understand what we are doing.

As I understand what this bill provides, it is roughly the following: It says that if a person who is drafted into the service of the country under the terms of legislation recently passed, is renting a home or purchasing a home or has some other contract on which he is liable to make payments, then he shall not be dispossessed or his family shall not be evicted or no action of that sort shall be taken without court permission during the time he is in the service or for 3 months thereafter. *I do not understand, however, that his payments are in any way forgiven to him, or anything like that. He is still liable to make the same payments at some future time as he would have to make under these circumstances.* The only thing that happens is that his family cannot be evicted or the property cannot be taken away from him, which he is in the process of purchasing.

*In the case of insurance I understand that the Government guarantees the difference between the amount of premium that the man can pay and the full amount of the premium but that the man must repay the Government for the amount that the Government pays on his behalf during this period, at some future time. * * ** If I am wrong about any of these remarks, I want to be corrected now. I am only a layman. I am not a lawyer and I have not been on the committee, but I just made these remarks because I think it is a very important bill to many thousands of people and that Members of Congress ought to consider it carefully and that we ought to be clear in our minds as to what we are doing.

Mr. VAN ZANDT. Mr. Speaker, will the gentleman yield?

Mr. VOORHIS of California. I yield.

Mr. VAN ZANDT. Did I understand the gentleman to say that where a person has an insurance policy and is unable to meet the payments, the Government will assume that responsibility?

Mr. VOORHIS of California. Perhaps the chairman of the committee had better answer it, but my understanding is that the Government pays the difference between the amount a man is considered able to pay and the full amount of the premium, while he is in the service.

Mr. ARENDS. Will the gentleman yield?

Mr. VOORHIS of California. I yield.

Mr. ARENDS. The gentleman is correct. However, he will be issued a certificate and *he will have to pay this back*. In other words, the Gov-

ernment wil have a lien against this man's insurance policy *until such time as the owner of the insurance policy reimburses the Government.*

Mr. VOORHIS of California. And how long does he have to pay it back? A year?

Mr. ARENDS. A year after he is out of service.

Mr. VOORHIS of California. *And during that year he must repay the Government what it has paid on his policy?*

Mr. ARENDS. *That is correct.*

APPENDIX F

Extract of VA records re Hendler's protected policy:

STATEMENT OF ACCOUNT
SOLDIERS AND SAILORS CIVIL
RELIEF ACT OF 1940

PART I

1. Policy No. 1,607,069	Face Amount—\$5,000	***
2. Insurer—The Maccabees	* * *	* *
3. Insured—Irwin P. Hendler	* * *	* *
4. Effective date—1/16/42	5. * * *	* *
6. Plan—Retirement Income @ 55	Participating—Yes	***
7. Policy loan rate of interest—4.8%	In advance?—Yes	***
8. Amount of annual premium—\$213.25		
9. Due date of first premium—3/1/42	10. Date policy terminated—10/6/47	

PART II

Debits		Credits		
Due Date of Annual Premiums	Amount of Annual Premiums	Cash Payments	Dividends Credited	Date of Credits
3/1/42	\$213.25	—	—	—
3/1/43	213.25	—	\$16.80	1/1/44
3/1/44	213.25	—	17.30	1/1/45
3/1/45	213.25	—	17.85	1/1/46
3/1/46	213.25	—	18.40	1/1/47
3/1/47	128.53	(220 days)	—	—
Total Debits	\$1194.78	Total Credits	\$70.35	
Interest	206.20	Interest	.58	
Total Debits with interest	\$1400.98	Total Credits with interest	\$70.93	
Total Debits with Interest				\$1400.98
Total Credits with Interest			\$70.93	
Policy Value from Part III			805.00	875.93
Amount Due U. S.				\$525.05

I hereby certify that the foregoing account is true

/s/ Edith O. Maske
Civil Relief Section

PART III

11. Policy values as of Date Policy Terminated:

(a) Cash surrender value	\$805.00
(b) Dividend credits other than listed in Part II	None
(c) Cash value of all paid-up additions	None
Total	\$805.00
* * *	*

In the United States Court of Appeals
for the Ninth Circuit

PAUL E. PLESHA, JAMES E. MABBUTT AND MYRON L.
KERN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEE

WARREN E. BURGER,
Assistant Attorney General.

LLOYD H. BURKE,
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Of Counsel.*

FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14,499

PAUL E. PLESHA, JAMES E. MABBUTT AND MYRON L.
KERN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEE

In their Opening Brief and in their Reply, appellants placed considerable reliance upon the district court opinion in *United States v. Hendler*, 123 F. Supp. 383 (D. Colo.), and also on the decision in *United States v. Gilman*, 347 U. S. 507, upon which the *Hendler* opinion is based. See App. Op. Br., pp. 10-11, 66-70; Reply, 17-18. We, on the other hand, argued in our main brief that the *Gilman* decision is entirely inapplicable to the present situation and that the district court opinion in *Hendler* is erroneous (see U. S. Br., pp. 57-62).

We noted, further, that an appeal had been taken in *Hendler* (*id.*, 15, 57).

Subsequent to the filing of the briefs in the present case, the United States Court of Appeals for the Tenth Circuit heard argument on and rendered its decision reversing the district court opinion in *Hendler*, completely substantiating the views we expressed in our main brief here. The Tenth Circuit's opinion in *Hendler* was rendered on July 26, 1955, and is now reported at 225 F. 2d 106. The case is directly in point on the principal question raised in the instant litigation. It discusses many of the arguments which appellants put forward here and squarely rejects them. It holds that the United States is entitled to reimbursement from the insured for its payment of his defaulted premiums made pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

For the convenience of the Court, we are reprinting the text of the *Hendler* opinion in an appendix, *infra*, pp. 5-19.

As noted in our main brief (pp. 57-62), *Hendler* was an action for reimbursement brought by the United States against a former serviceman whose private life insurance policy had been protected by the 1940 Act, and whose defaulted premiums had been paid by the United States. The defendant moved to dismiss the complaint for failure to state a cause of action. The district judge, while believing that morally the United States is entitled to reimbursement, held that the *Gilman* decision precluded recovery, and granted the motion for dismissal. 123 F. Supp. 383. On appeal, the Tenth Circuit reversed. It is significant that the arguments advanced by the defendant in the appellate court in *Hendler* were basically the same as appellants

in this case advance here. Contrary to appellants' position here, the Tenth Circuit holds that under the 1940 Act it is the insured—not the Government—who is primarily liable for premiums defaulted while a policy is under the Act's protection; the Government, it holds, acts merely as a guarantor (*infra*, p. 9). Contrary to appellants' argument here, the Tenth Circuit holds, on the basis of a careful review of the legislative history, that Congress did not intend that the payment of defaulted premiums by the United States shall be a gratuity, but, instead, intended that there be reimbursement under the usual rules of guarantyship (*infra*, p. 19). And, contrary to appellants' position here, the Tenth Circuit holds that when Congress amended the statute in 1942 by inserting an explicit provision that a debt arises when the United States pays the defaulted premiums, Congress did not—and did not intend to—effect any change in the law (*infra*, p. 17); Congress was, in other words, clarifying rather than modifying the statute.

The Court held, also, that the *Gilman* decision is clearly distinguishable and is not applicable (*infra*, pp. 17-19). Moreover, while noting the conflicting result of the district court in *Hormel v. United States*, 123 F. Supp. 806 (S. D. N. Y.) (pending appeal), see *infra*, pp. 9, 17 at fn 15, the Tenth Circuit refused to accept an argument based on the reasoning of that case which was virtually identical with the *Hormel* argument made by appellants here.

The Tenth Circuit's decision in *Hendler* completely confirms Judge Lemmon's decision below on the principal question involved in the instant appeal (R. 116-119). It is wholly dispositive of that question. The judgment below, therefore, should be affirmed.

Respectfully submitted,

WARREN E. BURGER,
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DAVID A. TURNER,
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DAVID C. BYRD,
*Attorney, Veterans' Administration,
Of Counsel.*

NOVEMBER, 1955.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT, MAY TERM, 1955

Number 5060

UNITED STATES OF AMERICA, APPELLANT,

vs.

IRWIN PINCY HENDLER, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO*

Lester Jayson, Attorney, Department of Justice, Washington, D. C. (Warren E. Burger, Asst. Atty. Gen., Donald E. Kelley, U. S. Atty., Denver, Colo., Samuel D. Slade, Attorney, Department of Justice, David A. Turner, Associate General Counsel and David C. Byrd, Attorney, Veterans' Administration, Washington, D. C., on the brief), for Appellant.

Gordon Slatkin, Denver, Colo. (Joseph Mosko, Denver, Colo., on the brief), for appellee.

Before BRATTON, HUXMAN and PICKETT, Circuit Judges.

HUXMAN, Circuit Judge.

This is an appeal from an order of the United States District Court for the District of Colorado, sustaining defendant's motion to dismiss the Government's complaint for failure to state a cause of action. The sole question presented for determination is whether the United States is entitled to recover reimbursement from an individual previously in the military service for premiums guaranteed and paid on a policy of life

insurance, pursuant to the provisions of Article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 501, et seq. (1940 Ed).¹

The United States in its complaint against the defendant, Irwin Pincy Hendler, appellee herein, alleged in substance that prior to entering the military service

¹ The pertinent provisions of the 1940 Act provided:

"Sec. 409. In the event that the military service of any person being the holder of a policy receiving the benefits of this article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

"Sec. 410. If the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any; PROVIDED; That if the insured is in the military service when this Act ceases to be in force, such lapse shall occur and surrender value be payable at the expiration of one year after the date when this Act ceases to be in force.

"Sec. 411. At the expiration of one year after the date when this Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security under this article, together with accrued interest to the date of the account, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section 410, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

"Sec. 412. The balance in favor of the insurer in each case shall be certified by the Administrator of Veterans' Affairs to the Secretary of the Treasury, who shall pay to the insurer the amount thereof, which is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, upon the surrender by the insured of the certificates delivered to it from time to time by the Administrator of Veterans' Affairs under the provisions of this article."

the defendant had a contract of insurance covering his life; that he made application for the benefits and protection provided for in Article IV; that the application was duly approved by the Administrator of Veterans' Affairs; that the insured failed within two years after termination of his military service to pay the premiums becoming due upon the policy and not paid during such period of military service; that in accordance with the provisions of Article IV the United States paid to the insurer the amount of such premiums; and that there was due from the defendant to the United States the amount so paid together with interest, for which judgment was prayed. The district court sustained the motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted.²

The pertinent sections of Article IV of the 1940 Act, under which this controversy arose, did not in express language make a serviceman receiving the benefits thereof personally liable for insurance premiums guaranteed and subsequently paid by the Government. Section 408, 50 U.S.C.A. Appendix, § 548 note gives the Government a lien on the policy to indemnify it against loss because of its guarantee of the suspended premium payments. Section 409 provides that in the event the military service of any person having obtained the benefit of the Act shall be terminated by death, the amount of any unpaid premiums with interest shall be deducted from the proceeds of the policy and included in the next monthly report of the insurer as premiums paid. Section 410 in part states that if the insured shall not within one year

² See 123 F. Supp. 383.

after the termination of his period of military service pay to the insurer all past due premiums with interest thereon the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof. Section 411 provides that at the expiration of one year after the date when the Act ceases to be in force there shall be an account stated between each insurer and the United States, in which there shall be credited to the insurer the total amount of the certificates held as security together with interest thereon, and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited, as provided for in Section 410, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest. Section 412 provides that if at the final accounting period a sum remains due the insurer such sum shall be certified by the Administrator of Veterans' Affairs to the Secretary of the Treasury, by whom the account so certified shall be paid.

Thus under the Act there are two specific methods of reimbursement for money expended by the Government for insurance premiums for servicemen who apply for the benefits of the Act. These are (1) payment out of the proceeds of policies that have matured, and (2) payment out of the accumulated cash surrender value of policies that have terminated under the Act. The question for our consideration is did Congress in the passage of the Act intend also to give the Government a personal cause of action against a surviving serviceman for sums paid in excess of the reserve value of the policy?

We think it is clear that the Government does not become primarily liable for the payment of premiums on insurance policies of servicemen who took advantage of the benefits of the Act. It is only a guarantor, guaranteeing payment thereof. It merely guarantees payment of such premiums as are not paid by policyholders who have come under the Act. It is well settled in the law that one who guarantees a debt of another and is required to pay the same is entitled to reimbursement from the principal debtor. This principle is so well settled that no citation of authority is necessary. Since the contract between the Government and the serviceman arising from the Act is one of guaranty, it must follow that the Government is entitled to reimbursement unless the Act itself compels a contrary conclusion. Whether the Act of 1940 contemplated that the Government was entitled to reimbursement is the crux of this case.

It must be conceded that the Act of 1940 does not provide for personal liability of the insured serviceman in specific terms. The Act has been considered by a number of courts.³ In all of them it has been treated as being ambiguous and subject to judicial construction. It is appellee's position that since the Act provides two definite ways of reimbursement and does not specifically provide for personal liability, by implication it limits the rights of recovery to the two methods provided therein and excludes any other method of recoupment. This argument comes with considerable force. We feel,

³ *United States v. Nichols*, D.C.N.D. Iowa 1952, 105 F. Supp. 543; appeal dismissed *Boller v. United States*, 8 Cir., 1953, 202 F. 2d 956; *Morton v. United States*, D.C.E.D.N.Y. 1953, 113 F. Supp. 496; *Plesha v. United States*, D.C.N.D. Cal. 1953, 123 F. Supp. 593; *Hormel v. United States*, D.C.S.D.N.Y. 1954, 123 F. Supp. 806.

however, that when the Act of 1940 and the Act of 1918, upon which it is predicated, are considered against the legislative background of the objects sought to be accomplished, a contrary conclusion is required.

The first question concerns what material we look to in seeking legislative intent. Appellee contends that we must confine ourselves to committee reports and not consider congressional debates and hearings. With this we cannot agree, notwithstanding what is said in *Lapina v. Williams*, 1914, 232 U. S. 78, 90, 34 S. Ct. 196, 58 L. Ed. 515, and *Duplex Printing Press Company v. Deering*, 1921, 254 U. S. 443, 474-475, 41 S. Ct. 172, 65 L. Ed. 349. An examination of the later decisions of the Supreme Court warrants the statement that a court may go beyond committee reports to ascertain legislative intent. In the Supreme Court decisions already handed down in 1955 which are set out in footnote 4,⁴ the Supreme Court refers to and, to some extent at least, relies upon Congressional debates and upon statements made at hearings. Nor can it be said that the Supreme Court has not considered the problem. In two recent decisions the late Mr. Justice Jackson wrote strong concurring opinions admonishing the majority for its extensive use of material more remote than committee reports.⁵ The reasons for the more liberal rule

⁴ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S. Ct. 313; *Wilburn Boat Co. v. Firemans' Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 363; *United States v. Bramblett*, 348 U.S. 503, 75 S. Ct. 504; *United States v. Menasche*, 348 U.S. 528, 75 S. Ct. 513; *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 75 S. Ct. 553; *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S. Ct. 591; *Maneja v. Waiialua Agric. Co.*, 349 U.S. 254, 75 S. Ct. 719; *Marcello v. Bonds*, 75 S. Ct. 757.

⁵ See *Schwegmann Bros. v. Calvert Distillers Corp.*, 1951, 341 U.S. 384, 395, 71 S. Ct. 745, 95 L. Ed. 1035; *United States v. Public Utilities Comm'n*, 1953, 345 U.S. 295, 319, 73 S. Ct. 706, 97 L. Ed. 1020.

are well stated by Mr. Justice Frankfurter in *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221, 73 S. Ct. 227, 229, 97 L. Ed. 260, as follows: "Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. *Boston San Co. v. United States*, 278 U. S. 41, 48, 49 S. Ct. 52, 73 L. Ed. 170. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. See *United States v. Jin Fuey Moy*, 241 U. S. 394, 402, 36 S. Ct. 658, 659, 60 L. Ed. 1061. For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress. Very early Chief Justice Marshall told us, 'Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived * * *' *United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304."

The first Soldiers' and Sailors' Civil Relief Act was passed in 1918. 40 Stat. 440. Since the Act of 1940 was a substantial reenactment of the Act of 1918 the history of that Act would seem pertinent. With respect to the provisions on reimbursement of the Government the two Acts are virtually identical. The subsequent legislation in 1942, concerning the right of recovery, and its legislative history is admissible to determine what Congress thought in 1940. See *Great Northern Railway Co. v. United States*, 1942, 315 U. S. 262, 277, 62 S. Ct. 529, 86 L. Ed. 836.

Most of the information of value concerning the 1918 Enactment is found in the hearings and the proposed bill which did not pass. The original bill purported to

suspend or postpone the proceedings against servicemen for the duration of the war. It provided that defaulted insurance premiums would be charged to the policy as a loan and paid by the insured with interest at any time within six months after termination of the insured's military service. The insurance companies objected, asserting that it would compel the insurance companies to maintain policies in force despite non-payment of premiums, contrary to the terms of the insurance contract; that in reality the serviceman was being given an option to pay or not to pay his defaulted premiums, as he saw fit, upon his return from the war because the bill failed to provide a consensual enforceable obligation with reference to premiums accruing in the future. To meet this objection, Dean Wigmore then serving as an officer in the Office of the Judge Advocate General suggested a guaranty by the Government that the premiums be paid. This suggestion was adopted and a bill emerged and was passed. In its reimbursement aspects it was identical to the Act of 1940. The Congressional Record contains nothing helpful on the 1918 Act except what may be deduced as an intention from general statements that the act was to "suspend enforcement of certain civil liabilities" and that the insurance provisions "guaranteed" payment by the serviceman. The only committee report of value is H. R. Rep. No. 181, 64th Cong. 1st Sess. 7-9 (1917). It was there pointed out that this bill covered a field entirely separate from the insurance provisions of the War Risk Insurance Bill. It was pointed out that under this bill all the Government did was to guarantee the payment of the premiums. It was reported that "If the soldier dies, the insurance company will get its premi-

ums out of the policy and the Government's guaranty will not be called upon. If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse, the Government will be subrogated to his rights." The statements contained in this report are not too helpful. They can be construed that the Government only guarantees the payments and thus indicate a right of action in the Government for the excess, but there are other provisions which would indicate the contrary.

The legislative history of the 1940 Act, with one notable exception, is also equivocal. The first proposals to reenact the Soldiers' and Sailors' Civil Relief Act left out the provisions in reference to taxes and insurance because the sponsor believed them inapplicable to the 1940 situation.⁶ Later, a bill was submitted and adopted which did contain the insurance features. The committee reports which accompanied the bills stated generally that their purpose was to "suspend enforcement of certain civil liabilities" and that it contemplated "suspension of the lapsing of insurance for default in payment of premiums."⁷ In direct reference to life insurance provisions, both reports stated that upon application by persons in the military service the Administrator of Veterans' Affairs might guarantee the payment of premiums in order to prevent lapsing or forfeiture of such policies; that such persons might within one year after leaving the military service pay up premiums paid by them and resume payment of regular premiums; that if they did not do so the policy

⁶ 86 Cong. Rec. 10052.

⁷ H.R. Rep. No. 3001, 76th Cong., 3d Sess. 1-2 (1940); Sen. Rep. No. 2109, 76th Cong., 3d Sess. 1-2 (1940).

lapsed and the cash surrender value accrued to the Government to the extent necessary to meet the cost of the premiums which it had guaranteed.

On the Senate floor there was little debate. All that was said was general talk of suspension of enforcement and of the Government's guarantee.⁸ In the House of Representatives Mr. Voorhis of California in speaking upon the bill stated that he would try to interpret the bill as he understood it and stated that in the case of insurance he understood that the Government guaranteed the difference between the amount of premiums that the man can pay and the full amount of the premiums, but that the man must repay the Government at some future time for the amount that the Government pays on his behalf during this period. He stated that if he was wrong about this interpretation he wanted to be corrected. In response, Mr. Arends, a member of the committee, replied that Voorhis' interpretation of the bill was correct. He stated that the insured would be issued a certificate and that he would have to pay this back. "In other words, the Government will have a lien against this man's insurance policy until such time as the owner of the insurance policy reimburses the Government." In response to a question by Voorhis as to the time the serviceman had to repay Mr. Arends replied, "A year after he is out of service." To which Mr. Voorhis replied as follows: "And during that year he must repay the Government what it has paid on this policy." Mr. Arends replied, "That is correct."⁹ While Mr. Arends was not the chairman of the Military Affairs Committee, he was a member of that committee

⁸ See 86 Cong. Rec. 12835.

⁹ 86 Cong. Rec. 13132-33 (1940).

and was conference manager on the part of the House when the bill was sent to the conference to iron out Senate and House differences. His reassurances as to the meaning of this bill when directly called into issue when the bill was up for consideration would seem to carry considerable weight.

The 1942 Amendments to the Civil Relief Act specifically provided for personal liability for any sum paid by the Government under its guarantee.¹⁰ The explicit liability as it now appears in the law was incorporated in the Senate Bill accompanying Sen. Rep. No. 716, 77th Cong. 1st Sess. (1941), where it was stated, "The proposed Amendment has been drafted in accordance with the suggestions of the Veterans' Administration for the purpose of clarification and will not effect any substantial change in the basic purposes of the bill." (*Id.* at p. 3). It was not until the next session that a similar bill came before the House Committee. At the hearings before the House Committee the following is the substance of what was said.¹¹ In response to a question by the chairman as to the payment on premiums on such policies, it was stated by a representative of the Veterans Administration that the insured was liable for all the premiums of the \$5,000 policy, the Government acting really as guarantor. However, if there is a default, there would be no liability for the whole amount in excess of the cash value, under the present construction of existing law. There was no registered reaction on the part of the committee members to this response, but it is perhaps significant

¹⁰ 56 Stat. 769, 775, 50 U.S.C.A. Appendix § 546.

¹¹ Hearings before the House Committee on Military Affairs on H.R. 7029, 77th Cong. 2d Sess. 38, 40 (1942).

that shortly thereafter Representative Sparkman stated that the members should understand this, "That the soldier is not relieved from the liability of paying premiums. The Government simply guaranteed that they will be paid." The bill that was reported and passed by the House of Representatives did not contain the express liability provision in the Senate bill and no comment was made in the House relative to the omission of that change.¹² In this session the Senate repassed the same bill which it had passed in the preceding session containing express liability payment provisions and containing the same comments that changes were to clarify existing law. Because of the differences between the House and Senate versions of the amendments, a conference committee was appointed. The conference committee retained the Senate provision concerning the liability on the guaranteed payments. The only reference in the report concerning this was as follows: "Under the House bill, any amounts paid by the United States to an insurer on account of approved applications do not become a claim against the owner of the policy. The Senate amendment (sec. 406) made such payments a debt due to the United States and authorized collection by deduction from any future amounts due the insured by the United States. The conference agreement retains the Senate provisions."¹³ Then reporting to the House, Representative Sparkman made this comment: "The three points on which the House yielded did not substantially change the bill. * * * Under the House Bill nothing was said about these amounts being claims against the person in the armed

¹² See H.R. Rep. No. 2198, 77th Cong. 2d Sess. (1942)

¹³ H.R. Rep. No. 2481, 77th Cong., 2d Sess. 6 (1942).

forces after he got out of the service. The Senate provides that they shall be a claim against him and shall be collected against any amounts that may become due him by the United States. The House accepted the Senate provision.”¹⁴

An examination of the legislative history of the 1942 Amendments thus indicates that the Senate did not think that it was changing the 1940 law by the enactment of this provision. The statement by Representative Voorhis, concurred in by a member of the House Committee, when the 1940 Act was under consideration also indicates that the House construed the 1940 Act as imposing personal liability.

A number of district courts have considered this question. In an exhaustive and well reasoned opinion, the trial court in *United States v. Nichols*, D. C. N. D. Iowa 1952, 105 F. Supp. 543, reached the conclusion that the 1940 Act imposed personal liability and that the 1942 Amendment worked no substantial change therein.¹⁵ The trial court in this case felt that the decision of the Supreme Court in *Gilman v. United States*, 1954, 347 U. S. 507, 74 S. Ct. 695, 98 L. Ed. 898, where it was held that the United States was not entitled to recover from one of its employees for whose negligence it was held liable under the Federal Tort Claims Act, 28 U. S. C. §§ 1346, 2671 et seq., controlled the decision in this case. But we think that case is clearly distinguishable. The Federal Tort Claims Act was not passed for the benefit of Government employees. It conferred

¹⁴ 88 Cong. Rec. 7545.

¹⁵ For similar holdings see *Morton v. United States*, D.C., E.D. N.Y. 1953, 113 F. Supp. 496; *Plesha v. United States*, D.C. N.D. Cal. 1953, 123 F. Supp. 593; for a contrary holding see *Hormel v. United States*, D.C.S.D. N.Y. 1954, 123 F. Supp. 806.

no benefits upon them. It did not relieve them of personal liability for their negligent acts. It was passed solely for the purpose of giving the aggrieved person a cause of action against the Government, the principal, which did not exist because of the Government's immunity to suit without its consent. That Act did not purport to establish the relation between the Government, the employer, and its negligent employees by the passage of the Act. Furthermore the Supreme Court found that the legislative history of that Act supported the conclusion that no right to a cause of action against the negligent employee was contemplated. Also the court placed strong reliance upon considerations of employee morale and the general employer-employee relationship between the Government and its vast army of employees, relationships which are not present in the case at bar.

Here we are dealing with the Government and its military servicemen in times of war, for whom it already had made provision for cheap life insurance before the passage of this Act. In this Act it was no concerned primarily with affording servicemen additional insurance. Its main concern was with the protection of their vested private rights. It intended to protect those rights by suspending the right to enforce legal obligations such as breach of contract resulting because of military service, and yet affording some protection to creditors. For that reason it gave servicemen who had commercial insurance in force the right to come in under the provisions of the Act and prevent the forfeiture of such insurance, because of their inability to make the payments during their time of service, by guaranteeing the premiums during their military service and affording them the opportunity to continue such

insurance in force when they returned. Not only do we find nothing in the legislative history indicating that this service was to be a gratuity to servicemen but on the contrary we think that the legislative history, considered against the background of the purpose sought to be accomplished by the passage of the Act, requires the conclusion that the usual rules of guarantyship were intended to apply to servicemen availing themselves of the additional benefits of the Act.

The judgment of the trial court is REVERSED and the cause is REMANDED with directions to proceed in conformity with the views expressed herein.

Circuit Judge BRATTON concurs in the result.

